INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE NO. 12,361

GRETEL ARTAVIA MURILLO ET AL.

(*IN VITRO* FERTILIZATION)

BRIEF OF *AMICI CURIAE*

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Introduction

This brief of *amici curiae* is presented by Alliance Defense Fund (ADF), the Center for Legal Studies at C-FAM, and Americans United for Life (AUL). It argues that Costa Rica's ban of in vitro fertilization, which is at issue in Case No. 12,361 (Gretel Artavia Murillo et al.), does not violate the American Convention on Human Rights. This is so because Costa Rica's action purports to protect life from the moment of conception, which is an aim consistent with an explicit provision of the Convention. Indeed, as it will be shown, Article 4(1) grants legal personhood to the unborn and orders States to protect life, in general, from the moment of conception. This provision allows—not demands—some exceptions to the protection of life. These exceptions will be described in this brief, but in vitro fertilization is not covered by them. Thus, it must be determined whether this technique is in itself an attempt against the unborn's life. In this matter there are opposing positions, both of them based on different evidence. One of these positions is that of the Supreme Court of Costa Rica, which considered that in vitro fertilization constituted an attempt against the life of the unborn. Interestingly, this Supreme Court decision was delivered by a former president of the Inter-American tribunal.

The complexity of this issue, the mere subsidiarity of the Inter-American jurisdiction, the impeccability of the Costa Rican democratic system, the importance of the non-derogable human right that this State is alleging to protect, and the fact that the application of the precautionary principle weighs in favor of protecting life in cases of doubt, are reasons whereby the Inter-American Court should grant Costa Rica a margin of appreciation, so that this State may decide the best way of protecting the life of a developing human being. Thus, the Court should reject the application of the Commission, which fails to address the most relevant article of the American Convention, and intrudes into an area that is solely within the competence of the State of Costa Rica. In addition, the Court should also reject the pleadings made by the representatives of those who claim to be victims of this case.

In the non-binding merits report that initiated this case,[1] the Inter-American Commission stated that the decision of the Costa Rican Supreme Court violated the rights established in the following Articles of the American Convention on Human Rights or Pact of

[1] Gretel Artavia Murillo y Otros (Fertilización *in vitro*) (in Spanish), Costa Rica, Report No. 85/10, Decision on the Merits, Case 12.361, 2010, Inter-Am. Comm'n H.R., *available at*: http://www.asamblea.go.cr/Centro_de_informacion/biblioteca/Documentos%20compartidos/TA-FIV/Costa%20Rica/I85-10.pdf (last visited Sept. 8, 2011).

San José: 11(2) (to privacy and family life), 17.2 (to raise a family), and 24 (equality before the law and equal protection), in relation to the obligations of a general character established in Articles 1(1) and 2.[2] The referred report of the Commission did not analyze the content of Article 4(1) of the Convention—which deals with the right to life "from the moment of conception"—despite the fact that Costa Rica's defense was mainly based on this norm. Indeed, the Commission only pointed out that "the State had in general terms, a legitimate end consisting in defending life, a good which is legally protected."[3]

This *amici curiae* brief argues that Article 4(1) of the American Convention on Human Rights, grants legal personhood to the unborn.[4] The Pact of San José has a very particular wording when addressing the right to life. It provides the following:

> Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.[5]

Based on the foregoing, this brief interprets the wording of Article 4(1) of the Convention, taking into consideration the different systems of interpretation, recounting what the Commission has stated on this subject, and assessing the value of the Commission's interpretation. The result of this analysis is to demonstrate that the Convention recognizes the *nasciturus*' status as a person, even though it may not protect its life in every circumstance.[6] After this analysis, it refers to the particular case of Costa Rica.

ADF is a non-profit international legal alliance which uses a unique combination of strategy, empowerment, financing and legal representation for protecting and preserving religious freedom, life, marriage and family. ADF and its collaborating organizations, which include more than 2,000 lawyers and numerous think tanks, have been either directly or indirectly involved in more than 500 cases and legal issues. These include approximately 15 cases before the European Court of Human Rights and many cases before the Supreme Court of the United States. Its main offices are in Scottsdale, Arizona. ADF also has an office for

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[2] *Id.*

[3] *Id.*, ¶ 96 (author's translation).

[4] This brief primarily uses the word "unborn," since this term as a concept includes both embryos and fetuses and is more accessible than the term *nasciturus*. Nevertheless, this brief will use the Latin word *nasciturus* as a synonym of "unborn."

[5] Art. 4(1), American Convention on Human Rights. The Spanish and English versions of this provision are equivalent.

[6] Exceptions to this protection are discussed below.

Latin America, located in Ciudad de México, and has presented amicus curiae briefs before several Latin-American courts, including the Supreme Courts of Mexico and Argentina, and also the Inter-American Court.

The Center for Legal Studies is a program of C-FAM, a non-partisan, non-profit research institute founded in the summer of 1997. C-FAM is an NGO dedicated to monitor and affect the social policy debate at the United Nations and other international institutions, in order to protect and promote goods such as the dignity of the human person. C-FAM's personnel have participated in every major UN social policy debate since 1997 including the Rome Statutes of the International Criminal Court, the Convention on Disabilities, Cairo+5, and dozens of others.

AUL is a nonprofit public-interest law and policy organization promoting a vision in which everyone is welcomed in life and protected in law. Founded in 1971, it was the first national United States organization of this kind. AUL's aim is pursued through vigorous legislative, judicial and educational efforts at the state, national and international levels. AUL's experts usually feature in newspapers, magazines and TV networks across the United States.

1. Interpreting Article 4(1) in Relation to the Unborn Child

The Inter-American tribunal has referred many times to the rules of interpretation of the Vienna Convention on the Law of Treaties as (VCLT) guiding its interpretation of the Pact of San José.[7] The VCLT sets out not only the criteria by which a norm must be interpreted, but also the precedence which must be given to each of them. However, some interpretations of Article 4(1) have had "major problems ari[sing] largely as a result of . . . . ignoring the existence of the canons of interpretation codified by the Vienna Convention of the Law of Treaties."[8] Thus, this brief of *amici curiae* will follow the principles established in this source of international law, which require interpretations to be carried out in good faith and by analyzing "the terms of

[7] This system has been used since the Court's early days, e.g. Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 48 (Sept. 24, 1982), and still continues, e.g. Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶ 23 (Sept. 29, 2009). The relevant rules of the Vienna Convention are established in arts. 31-33. Vienna Convention of the Law of Treaties, 1155 U.N.T.S. 331 (1969) [hereinafter "Vienna Convention" or "VCLT"].

[8] Dinah Shelton, *Abortion and the Right to Life in the Inter-American System: The Case of "Baby Boy"*, 2 HUM. RTS. L.J. 309, 313 (1981).

the treaty in their context and in the light of its object and purpose."[9] This brief will also make reference to a possible evolutive and *pro homine* interpretation.

1.1. Primary Method of Interpretation According to the Rules of the Vienna Convention

This brief will interpret the text of the relevant norms of the Pact of San José, taking into account this Convention's context, object and purpose.[10] In doing so, this brief will begin by thoroughly analyzing Article 4(1), which is composed of three sentences:

1st: "Every person has the right to have his life respected;"

2nd: "This right shall be protected by law and, in general, from the moment of conception;" and

3rd: "No one shall be arbitrarily deprived of his life."

The first of these sentences declares the existence of a right to life. The second refers to the right declared in the previous sentence and establishes an obligation of the State. The third makes explicit a consequence of the right established in the first sentence.

The second sentence alludes to conception, posing the challenge in determining whether this means that a human organism has rights from this time.[11] This sentence, the most important for this brief's textual analysis, is severed by the "in general" phrase. Without this insertion it would read as follows: *This right shall be protected by law and from the moment of conception*,[12] which is the wording that was proposed by the three original drafts of the Convention.[13]

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[9] Art. 31(1) VCLT.

[10] Originally the Inter-American Court asserted "the principle of the primacy of the text" (*Advisory Opinion OC-3/83*, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 50), but now it tends to stress the importance of analyzing the Convention as a whole. See *Advisory Opinion OC-20/09*, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶¶ 23 ff.

[11] This *amici curiae* will use the words "conception" and "fertilization" interchangeably. Works of legal scholarship do not usually define conception, but seemingly the majority of authors consider it as a synonym of fertilization, e.g.: Rudy J. Gerber, *Abortion: Two Opposing Legal Philosophies*, 15 AM. J. JURIS. 1, 7 (1970); Eithne Mills & James McConvill, *The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience*, 4 EUR. J.L. REFORM 481, 488 (2002) (Neth.); Marco Gerardo Monroy Cabra, *Derechos y Deberes Consagrados en la Convención Americana sobre Derechos Humanos "Pacto de San José de Costa Rica"*, *in* LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS 33, 36 (Comisión Interamericana de Derechos Humanos ed., 1980); Ángela Vivanco Martínez, *La Píldora del Día Después*, 35 REVISTA CHILENA DE DERECHO [R. CH. D.] 543, 544 (2008) (Chile). More recently, many legal scholars asserted in the first footnote to the *San José Articles* that conception or fertilization "is the union of an oocyte and sperm cell." SAN JOSE ARTICLES, http://www.sanjosearticles.com/?page_id=88 (last visited Feb. 8, 2012).

[12] This provision can be compared with the second sentence of Article 6(1) of the International Covenant on Civil and Political Rights, which states: "This right shall be protected by law." International Covenant on Civil and Political Rights, Dec. 16, 1966 (ratified by the U.S. on June 8, 1992), G.A. Res. 2200 A, U.N. GAOR, 21st Ses., Supp. No. 16, at 52, U.N. Doc. A/6316 [hereinafter ICCPR].

[13] I.e., the Draft Convention on Human Rights approved by the Fourth Meeting of the Inter-American Council of Jurists, Santiago, Chile, Sept., 1959, Doc. CIJ-43; the *Proyecto de Convención sobre Derechos Humanos*,

In order to avoid the complexities added by the phrase "in general", this analysis will be divided in two parts, one analyzing the second sentence of Article 4(1) without this phrase, in order to understand the idea subject to this proviso, and the other with it.

1.1.1. Textual Interpretation of Article 4(1)

The subject of the sentence *this right shall be protected by law and from the moment of conception* is "this right." The word "this" refers to the right whose existence is recognized in the first sentence: the right to life. Since this second sentence is constructed in a passive voice,[14] there is an action performed on the subject "this right," which is "protection." This sentence does not expand or restrict the right to life; it only establishes an obligation regarding its protection. Indeed, the right to life would exist even if it were not protected by the State. The expressions "by law" and "from the moment of conception" are qualifying the action of protection; providing that the safeguard given to the right to life shall have at least these qualities. Thus, the State is not absolutely free for determining how to protect life,[15] since it is compelled to defend it *by law*. Similarly, the legislator cannot choose to provide this protection from a particular stage of human development,[16] since it is obliged to grant it from the moment of conception (at least as a general rule, as will be expanded upon *infra*).

This mandate to protect life from the moment of conception is based on the understanding that the right to life exists from fertilization onwards. Otherwise, there would be nothing to *protect* at the moment of conception.[17] Furthermore, it must be noted that the second

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presented by the Government of Chile to the Second Extraordinary Inter-American Conference, Río de Janeiro, 1965, Doc. 35; and the *Proyecto de Convención sobre Derechos Humanos,* presented by the Government of Uruguay to the Second Extraordinary Inter-American Conference, Río de Janeiro, 1965, Doc. 49. All of them are *reprinted in* GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, ANUARIO INTERAMERICANO DE DERECHOS HUMANOS 1968 / INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS 1968 237, 280 & 298, respectively (1973). The two latter ones are only available in Spanish.

[14] An active voice construction of this sentence would read as follows: The law shall protect this right from the moment of conception.

[15] *E.g.* it cannot decide to protect it only via administrative actions, such as the economic support of mothers in a state of financial need.

[16] *E.g.* twenty-eight days after birth, as in the opinion of Kuhse and Singer. HELGA KUHSE & PETER SINGER, SHOULD THE BABY LIVE? THE PROBLEM OF HANDICAPPED INFANTS (1985). These authors "do not think new-born infants have an inherent right to life" (*Id.* at 192), and affirm that States should allow the killing of undesired disabled babies until the 28th day after birth (*Id.* at 189-197). Kuhse & Singer quote other authors who advocate the establishment of "such a period before full acceptance of the infant" (*Id.* at. 195).

[17] This provision of the Pact of San José seeks to strengthen the protection of the unborn. It does so following the trend of international treaties, which often show an explicit concern for groups of people whose rights have been repeatedly violated in the past, or when there is a real threat of these rights being violated in the future, as

sentence of Article 4(1) draws its understanding of the unborn's right to life from the first sentence, which declares that every *person* has this right. This means that the Convention not only declares that unborn children have a right to life, but also that they are persons. In this particular regard Article 4(1) allows no other interpretation, since its first sentence refers to the right of every *person* to have his or her life respected and the second prescribes an obligation to protect *this right* of the person, in general, from the moment of conception. Any attempt to restrict the scope of the concept of *person* to some later starting point—whether before, at the moment, or after birth—is excluded by the clear language of Article 4(1).

The foregoing assertions can be buttressed by other norms in the Pact of San José, which exhibit a general trend in the Convention in this regard. For instance, Article 1(2) establishes that "[f]or the purposes of this Convention, 'person' means every human being." This norm, which has no counterpart in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention or ECHR) or in the ICCPR**,** reinforces the unborn child's personhood, since it is very difficult to contest the fact that embryos and fetuses belong to the human species.[18] Another norm is Article 4(5), which forbids the application of capital punishment to pregnant women, since this rule was not established in favor of the mother (whose basic rights are put to an end with capital punishment), but rather in favor of the developing child.[19] Besides, the American Convention is not the only human rights treaty to make explicit declarations regarding the unborn, since the ninth paragraph of the Preamble of the Convention on the Rights of the Child also does so. Quoting the Declaration of the Rights of the Child, it declares that "the child, by reason of his physical and mental

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it happens with the International Convention on the Elimination of All Forms of Racial Discrimination, with the Convention on the Elimination of All Forms of Discrimination Against Women and with the Convention on the Rights of Persons with Disabilities.

[18] It cannot be said that this rule wishes to clarify that women are protected by the Convention, since there has never been any doubt in this regard, and because the American Treaty does not use the word *men* when referring to persons. An author who contests the unborn's humanity is Philip Alston, who also considers that in international law "there is no precedent for interpreting either that term [child], or others such as 'human being' of 'human person,' as including a fetus." He, nevertheless, considers that Article 4(1) of the American Convention specifies its intention of considering the unborn as a human being. Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 170 (1990). *But see* RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD (2009) (citing various sources of international law as affirming the unborn as a human being).

[19] This is similar to the right established in art. 6(5) ICCPR. According to the *travaux préparatoires* of this latter Convention, "[t]he Principal reason for providing […] that the death sentence should not be carried out on pregnant women was to save the life of an innocent unborn child," A/3764 ¶ 118, *reprinted in* THE RIGHT TO LIFE IN INTERNATIONAL LAW, 53 (B. G. Ramcharan ed. 1985).

immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[20]

It has been suggested that unborn children's incapacity to enjoy every right established in the Convention is proof of their non-personality.[21] This argument is not well-grounded, since there are rights in the Pact of San José which cannot be exercised even by adults, especially when they are in uncommon situations, as it happens with persons in a vegetative state. Even more so, there are many rights which cannot be fully exercised by born children, mostly during their early years. Likewise, several Convention rights were established for the sole benefit of certain categories of people, as it happens with some rights of citizens and minors. Therefore, the impossibility of exercising certain rights declared in a human rights treaty does not prevent people from exercising the rest of them and, *a fortiori*, does not make them lose their status as persons.

The previous analysis does not include the phrase "in general", which requires interpretation. Its literal meaning in this context is simply that the rule on the protection of the right to life from the moment of conception may have some exceptions. In other words, the Pact of San José understands that there may be some obstacles in protecting life from the moment of fertilization. However, these hurdles may impede the protection of unborn children, but do not deprive them of their personhood. This is unquestionable, since the "in general" phrase was placed in the sentence related to the protection of the right to life, not in the sentence establishing the right itself.[22] The extent of the "in general" proviso is not defined in

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[20] It is important to consider that in some editions of the Oxford English Dictionary the first meaning for the word child includes the unborn. See Shorter Oxford English Dictionary 397, Vol. I (6th ed. 2007) or The Compact Edition of the Oxford English Dictionary 396, Vol. I (1971). There are two approaches to whether the Convention on the Rights of the Child is applicable to the unborn. Bruce Abramson considers that it is applicable. BRUCE ABRAMSON, VIOLENCE AGAINST BABIES: PROTECTION OF PRE- AND POST-NATAL CHILDREN UNDER THE FRAMEWORK OF THE CONVENTION ON THE RIGHTS OF THE CHILD 56-103 & 195-211 (Revised ed. 2006), http://www.law2.byu.edu/wfpc/policy%20issues/VIOLENCE%20AGAINST%20BABIES.pdf (last visited Feb. 8, 2011).

[21] CECILIA MEDINA QUIROGA, LA CONVENCIÓN AMERICANA: VIDA, INTEGRIDAD PERSONAL, LIBERTAD PERSONAL, DEBIDO PROCESO Y RECURSO JUDICIAL 75 (2003).

[22] There are a few authors who consider that it is *life*, not *protection*, what may have exceptions to its commencement from the moment of conception. *E.g.*, JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 341 (2003), and Lauri R. Tanner, *Interview with Judge Antônio A. Cançado Trindade, Inter-American Court of Human Rights*, XVI ANN. SURV. INT'L & COMP. L. 165, 177 (2010). This stance not only disregards the sentence to which the "in general" proviso is made (that referring to protection), but also forgets that biological processes—an example of which is the beginning of life—are common to all humankind. Therefore, even though diverse legal systems may consider different moments as the beginning of life for juridical purposes, this moment should be the same for everyone under a particular jurisdiction. Judge A. Cançado Trindade also acknowledges that domestic laws admitting abortion would be one of the reasons why some States have not ratified the Convention. *Id.* at 177.

the American Convention, therefore, it will be analyzed later in this brief of *amici curiae*, after referring to the other interpretative tools and the Commission's reading of Article 4(1).

1.1.2. Other Considerations for a Textual Interpretation of Article 4(1)

The Vienna Convention requires that textual interpretations must accord with the context, object and purpose of a treaty (Articles 31(2) & (3) VCLT). There are no instruments, practices or rules for interpreting the issue of personhood as those described in the VCLT as comprising the context of a treaty.[23] Hence, this section will mainly deal with the object and purpose of the Pact of San José, which could be said to be the creation of legally binding regional standards for the protection of human rights and the establishment of a system to supervise their fulfillment.[24] This object and purpose is compatible with the previously described interpretation of Article 4(1), because it is understandable if a human rights convention seeks to protect human life *per se*, regardless of its stage of development.

Some might argue that the aforementioned interpretation—which could restrict abortions significantly, depending on the interpretation given to the "in general" phrase—would be at odds with granting protection to other rights usually referred to when dealing with abortion, such as privacy and physical integrity.[25] Part of this issue will be addressed when analyzing the possibility of reading the Convention in an evolutive fashion. However, it should be noted that the legal extent of these other rights varies according to the instrument in which they are established. Therefore, even though privacy and physical integrity have been considered in other jurisdictions as rights related to the procurement of abortions, this may not be so in the

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[23] Indeed, there are no other agreements or instruments made between all of the parties—or accepted by them—in connection with the conclusion of the treaty, nor agreements between the parties regarding the interpretation or application of this particular provision, nor any other relevant rules of international law applicable in this particular regard (*Cf.*, arts. 31(2) & (3) VCLT). Both the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (1988) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) contain some rules about the protection of families and women, but they do not refer to the issue of the unborn; they are not strictly aimed at interpreting the Pact of San José; and they do not establish international rules in the matter of the right to life, so they cannot be appropriately considered as context for analyzing whether the unborn is deemed a person according to the American Convention.

[24] It has been argued that a treaty may have several objects and purposes, and that different norms may have different objects and purposes as well. However, it is also asserted that this latter approach would deprive the object and purpose of much of its interpretative value. See Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 LAW & PRAC. INT'L CTS. & TRIBUNALS 443, 474 (2010) (Neth.).

[25] *E.g.* the United State's Supreme Court determined that freedom to perform an abortion was included under the implied "right to privacy" (under certain requirements of the trimester rule). Roe v. Wade, 410 U.S. 113 (1973).

American Convention. In this regard, the text of this treaty has no explicit provision—besides the "in general" phrase—which could be inferentially related to the issue of abortion. This is in contrast to the Pact of San José's explicit declaration of the unborn's personhood. Furthermore, even the idiom "in general" could be interpreted as reflecting the Convention's stance in a possible clash between right to life and other rights such as privacy and physical integrity. This is so because this phrase implies that the Convention allows certain interferences with the right to life, but that such interferences may only occur exceptionally and in no case the exception could be made to swallow the rule.

The Convention's approach to the right to life could be considered as a guiding value of this regional system, since it reflects the special importance which domestic legislation grants to the unborn in the context of the Americas. Indeed, many political constitutions—some of which were promulgated as recently as 2008 and 2010—protect life from the moment of conception.[26] This concern is also enshrined in the legislation of countries whose constitutions make no explicit reference to conception, but whose legal system ban every type of direct abortion, as in the case of Chile, Nicaragua and Honduras.[27] El Salvador and the Dominican Republic—whose Constitution protects life from the moment of conception—also have

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[26] CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, 2008, art. 45; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA, 2010, art. 37 (this disposition did not exist in previous Dominican Constitutions); CONSTITUCIÓN (El Salvador), 1992, art. 1(2); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, 1985, art. 3 (all of the foregoing refer to the moment of conception without any phrase analogous to the ACHR's "in general"); CONSTITUCIÓN NACIONAL DE LA REPÚBLICA DEL PARAGUAY, 1992, art. 4 (has the same wording as the ACHR); and CONSTITUCIÓN POLÍTICA DEL PERÚ, 1993, art. 2 No. 1 (establishes the rule *infans conceptus pro nato habetur, quoties de connodis ejus agitur*). Besides these member State constitutions, there are also many constitutions of federal states which acknowledge the existence of life from the moment of conception, with or without explicit exceptions. For instance, the majority of Mexican states approved amendments to their constitutions during the years 2008 and 2009 in order to recognize life from the moment of conception, e.g.: Chihuahua, Sonora, Baja California, Morelos, Colima, Puebla, Jalisco, Durango, Nayarit, Guanajuato, and several others (this happened as a reaction to Mexico City's recent liberalization of abortion). The Supreme Court of Mexico did not strike down these amendments (*see* Acción de Inconstitucionalidad 11/2009). This is also the case in many Argentinean state's constitutions, e.g.: Provinces of Córdoba, Tucumán, Tierra del Fuego and Salta. Also in the case of Argentina, when ratifying the Convention on the Rights of the Child this State declared that: "child means every human being from the moment of conception up to the age of eighteen." In addition, the Constitutions of Chile and Honduras explicitly protect the unborn, and have been interpreted by the Chilean Constitutional Court and the Honduran Supreme Court of Justice as granting this protection from the moment of conception.

[27] See CÓDIGO PENAL [CÓD. PEN.] [Criminal Code] arts. 342-345 (Chile), CÓD. PEN. arts. 143-145 (Nicar.), and CÓD. PEN. arts. 126-129 (Hond.). All these countries used to have exceptions to the prohibition of abortion. Usually Honduras is not considered among the countries banning abortion in every situation, but no exceptions to the prohibition of abortion can be found in its Penal Code or in the Code of Medical Ethics of the Medical Council (Código de Ética del Colegio Médico de Honduras, COLEGIO MÉDICO DE HONDURAS, http://www.colegiomedico.hn/doc/leyes/27_reglamento_codigo_etica.pdf, (last visited Apr. 10, 2011)).

legislation forbidding every kind of direct abortion.[28] Another interesting case is that of the Costa Rican prohibition of in vitro fertilization in its current stage of development, which is the matter that has occasioned this *amici curiae*.[29] Moreover, it does not seem to be a coincidence that all the previously referred countries are ratifying parties to the Convention, while the majority of States with liberal abortion laws are not (*e.g.* United States, Canada, Guyana and Cuba).[30]

Furthermore, legal scholarship is aware that Article 4(1) of the Convention protects the life of the unborn, even though there are outlier exceptions to this understanding.[31] Thus, in the early years of the Pact of San José, the former President of the Inter-American Commission, Marco Monroy Cabra, wrote when he was a delegate of that organization: "It is obvious that the Pact of San José is more developed [than the ICCPR] since it protects life 'from the moment of conception.' This may involve some difficulties for the States which allow abortion in certain circumstances."[32] Monroy goes even further by saying that "[t]he right to be born is a particular manifestation of the right to life, whereby the great majority of States define abortion as a crime."[33]

The contemporary understanding that the Convention protects the life of the unborn is apparent in the opinion of international human rights scholars, such as Cançado Trindade,[34] Rodríguez Rescia,[35] Joseph,[36] Pasqualucci,[37] and many others.[38] In addition to these authors,

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[28] CÓD. PEN. (El Sal.) arts. 133-137, and CÓD. PEN. (Dom. Rep.) Art. 317. El Salvador used to have exceptions to the prohibition of abortion. Regarding the Dominican Republic's use of the state of necessity for leaving some abortion unpunished. See ABORTION POLICIES, infra note 186, at 130.

[29] Corte Suprema [C.S.], Sala Constitucional [Supreme Court, Constitutional Chamber], Mar. 15, 2000, Sentencia: 02306, Expediente: 95-001734-0007-CO, "Considerando" IX, available in Spanish at http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=128218&strTipM=T&lResultado=10 (last visited July 17, 2011). However, this decision would allow the application of in vitro fertilizations once this technique's mortality rate of embryos is diminished. This brief will address a case before the Commission regarding this issue.

[30] The latter not being an active member to the O.A.S.

[31] E.g., Cecilia Medina asserts that the Convention is compatible, or even requires, liberal legislation in the issue of abortion (MEDINA QUIROGA, *supra* note 21 at 66 ff.). Scott Davidson has a more nuanced stance and asserts that "the questions of whether a foetus is a human being and when a human being ceases to exist are not answered by the instruments themselves [the American Declaration and the American Convention]." in Scott Davidson, *The Civil and Political Rights Protected in the Inter-American Human Rights System*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 213, 216 (1998).

[32] Monroy Cabra, *supra* note 11 at 36. Author's translation from the Spanish original.

[33] *Id.*

[34] In Tanner, *supra* note 22 at 177.

[35] VÍCTOR RODRÍGUEZ RESCIA, LAS SENTENCIAS DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: GUÍA MODELO PARA SU LECTURA Y ANÁLISIS 11 (2009).

[36] JOSEPH, *supra* note 18 at 213 ff.

[37] PASQUALUCCI, *supra* note 22 at 341.

some State officials have also endorsed this interpretation. For instance, during the year 2008 the then president of Uruguay Tabaré Vázquez Rosas invoked Article 4(1) of the Convention when he vetoed a bill purporting to introduce abortion until the twelfth week.[39] Similarly, in 2003 the Canadian Standing Senate Committee on Human Rights expressed that Article 4(1) raised "concerns related to the preservation of the status quo, in Canadian law, with respect to abortion."[40]

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[38] Other examples are: José Alfredo de Oliveira Baracho (José Alfredo de Oliveira Baracho, *A Prática Jurídica no Domínio da Proteção Internacional dos Direitos do Homem (A Convenção Européia dos Direitos do Homem)* in CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1 LIBER AMICORUM HÉCTOR FIX-ZAMUDIO 375, 398 (Secretaría de la Corte Interamericana de Derechos Humanos ed. 1998), *available at* http://www.corteidh.or.cr/docs/libros/FixVol1.pdf (last visited Feb. 15, 2011)); Rodolfo Barra (RODOLFO CARLOS BARRA, LA PROTECCIÓN CONSTITUCIONAL DEL DERECHO A LA VIDA 60 (1996), quoted by HERNÁN CORRAL TALCIANI, DERECHO CIVIL Y PERSONA HUMANA: CUESTIONES DEBATIDAS 86 (2007)) (who shares his opinion); Héctor Gros Espiell (HÉCTOR GROS ESPIELL, LA CONVENCION AMERICANA Y LA CONVENCION EUROPEA DE DERECHOS: ANALISIS COMPARATIVO 82 & 83 (1991)); Nihal Jayawickrama (NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW 248 (2002)); Ricardo Bach de Chazal, El Aborto en El Derecho Positivo Argentino (2009); Ligia M. De Jesús, *Post Baby Boy v. United States developments in the Inter-American system of human rights: inconsistent application of the American Convention's protection of the right to life from conception*. 17 L. & Bus. Rev. Am. 435 (2011); and Patricia Palacios Zuloaga (Patricia Palacios Zuloaga, *La Aplicabilidad del Derecho a la Vida al Embrión o Feto en la Jurisprudencia Internacional*, 1 ANUARIO DE DERECHOS HUMANOS. 75, 79 (2005) (Chile)). Among those adopting this position there are also people who think that the Convention is compatible with rather liberal approaches to abortion, such as William Schabas, who considers "that Article 4(1) does not impose an obligation to prohibit abortion, in general, although it may require States to regulate the practice and to prohibit it in certain cases, such as after a certain number of weeks of pregnancy." William A. Schabas, *Canadian Ratification of the American Convention on Human Rights*, 16 NETH. Q. HUM. RTS. 315, 328 (1998)).

[39] Communication from the *Presidencia de la República Oriental del Uruguay* [Presidency of the Oriental Republic of Uruguay], to the *Presidente de la Asamblea General* [President of the General Assembly] (Nov. 14, 2008), *available at* http://www.presidencia.gub.uy/_Web/proyectos/2008/11/s511__00001.PDF (last visited Feb. 5, 2011). President Vázquez's left wing political affiliation is an expression that in Latin America the debate regarding abortion cannot simply be presented as a conservative-versus-liberal one. Other examples of this are that the new Nicaraguan law against abortion was supported by the extreme left Sandinistas (F.S.L.N.); that the new Ecuadorian Constitution protecting life from the moment of conception was discussed and enacted during Rafael Correa's government; and that the constitutional amendments protecting the unborn in several Mexican states (*supra* note 26) were in many cases supported by members of the *Partido Revolucionario Institucional* (P.R.I.), and even of the *Partido Revolucionario Democrático* (PRD). Similarly, the fact that President Tabaré Vázquez is an agnostic (CARLOS LISCANO, CONVERSACIONES CON TABARÉ VÁZQUEZ 33 & 34 (2004)) and that Nicaragua is among the Central and South American countries with a lesser proportion of Catholics (58%, with 16% who declare themselves of no religion) (GOBIERNO DE NICARAGUA. INSTITUTO NACIONAL DE ESTADÍSTICAS Y CENSO, VIII CENSO DE POBLACIÓN Y IV DE VIVIENDA, 2005: POBLACIÓN: CARACTERÍSTICAS GENERALES 195 (2006), http://www.inide.gob.ni/censos2005/VolPoblacion/Volumen%20Poblacion%201-4/Vol.I%20Poblacion-Caracteristicas%20Generales.pdf (last visited Feb. 4, 2011)), shows that the Latin American stance towards abortion cannot be explained only by the position of Catholics on this issue. This is also understood by Mala Htun, who considers that "[t]he intensity of religious belief does not correspond to the course of gender rights reform." MALA HTUN, SEX AND THE STATE: ABORTION, DIVORCE, AND THE FAMILY UNDER LATIN AMERICAN DICTATORSHIPS AND DEMOCRACIES 27 (2003) (who includes within the notion "gender rights reform" a liberal access to abortion).

[40] THE SENATE, STANDING SENATE COMMITTEE ON HUMAN RIGHTS, ENHANCING CANADA'S ROLE IN THE OAS: CANADIAN ADHERENCE TO THE AMERICAN CONVENTION ON HUMAN RIGHTS 61 (2003), *available at* http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep04may03-e.pdf (last visited Feb. 26, 2011).

If the interpreter were to consider that the Convention did not purport to declare and protect the right to life from the moment of fertilization, the reference to conception in Article 4(1) would be rendered useless. This would be at odds with the basic principle of interpretation stating that norms should be read in a way in which they are not rendered meaningless—*ut res magis valeat quam pereat*. Therefore, it should be understood that the text of the Convention, in the light of its context, object and purpose, considers the unborn as entitled to the right to life, even though there may be some exceptions to this right's protection, the extent of which will be addressed later in this brief. The following section, despite the principle of *in claris non fit interpretatio*, will deal with other interpretative procedures, such as recourse to the *travaux préparatoires* of the Pact of San José.

1.2. Supplementary Method of Interpretation: *Travaux Préparatoires*

The *travaux préparatoires* are only a subsidiary means of interpretation according to the Vienna Convention.[41] They should "be used either to confirm the meaning of the treaty or as an aid to interpretation where . . . . the meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable."[42] Despite this, several elucidations of Article 4(1) of the Pact of San José have relied primarily on the *travaux préparatoires*.[43] However, even this subsidiary means of interpretation supports the fact that the unborn is considered to be a person in the Inter-American system.

As it was previously stated, the three original drafts of the Convention proposed to approve the following sentence: "This right shall be protected by law and from the moment of conception."[44] However, when the Commission received these drafts and made its own proposal, it "sought to make the principle stated in the Draft less strict and therefore proposed inserting the words 'in general',"[45] but it, nevertheless, considered that "for *reasons of principle* it was *fundamental*" to maintain the provision's reference to conception.[46] This wording rejected the

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[41] Art. 32.

[42] Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, *in* INTERNATIONAL LAW 187, 201 (2nd ed. 2006).

[43] *Cf.* Shelton, *supra* note 8 at 314.

[44] *Ver* nota 13.

[45] Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Conventions on Human Rights (OEA/Ser.L/V/IL 19 Doc. 18), *reprinted in* GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, *supra* note 13 at 193.

[46] *Id.* at 97(emphasis added).

Rapporteur's recommendation, which was to leave the question of the protection of the right to life from conception "open"—suppressing the reference to conception—in order to avoid the possibility of conflicting with the United Nations ICCPR.[47]

During the drafting of the Convention, the relevant norm of the Pact of San José was understood as recognizing personhood in the unborn—with all its consequences—and this is why Brazil proposed to suppress the phrase "and, in general, from the moment of conception." This State argued that, even though the Brazilian Civil Code protected the rights of the unborn from the moment of conception, its Penal Code allowed abortions to be practiced when pregnancy threatened the life of the woman or when it was the consequence of rape.[48] Brazil also argued that the expression "in general, from the moment of conception" was vague, so it would not be effective in preventing States from legalizing abortion, and should therefore be eliminated, allowing American countries to regulate the termination of pregnancies.[49] The Brazilian proposal was supported by the United States.[50] It is worth noting that the laws of Brazil have not changed much since then, so currently they are highly protective of life.

The Brazilian proposition was strongly opposed by Venezuela, who argued that domestic laws could not be used for determining international civil and political rights; that the Convention could make no concessions regarding the existence of the right to life from the moment of conception; and that it would be unacceptable for a Convention not to establish

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[47] *Id.* at 193. The *Rapporteur* was the Brazilian Carlos Dunshee de Abranches, one of the Commissioners who subsequently voted in the *"Baby Boy" case* that the Declaration did not protect the right to life from the moment of conception—and that the Convention would not necessarily do so either. See United States, Case 2141, Inter-Am. Cmm'n. H.R., Res. 23/81, OAS/Ser. L/V/II.52 Doc. 48, "Whereas" ¶ 30 (1981), *available at* http://www.cidh.org/annualrep/80.81eng/usa2141.htm [hereinafter *"Baby Boy" case*].

[48] SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, CONFERENCIA ESPECIALIZADA INTERAMERICANA SOBRE DERECHOS HUMANOS: ACTAS Y DOCUMENTOS, OEA/SER.K/XVI/1.2, SAN JOSÉ, COSTA RICA, 7-22 DE NOVIEMBRE DE 1969 121 (1973), *available at* http://www.corteidh.or.cr/tablas/15388.pdf (last visited Jan. 30, 2011). According to the text of the *travaux préparatoires* Brazil used the Spanish word *estupro*, which means sexual intercourse with a minor who is able to give consent, when this carnal relation has been obtained by deceit or the abuse of the superiority of the offender (*Cf. Diccionario de la Real Academia Española* [Dictionary of the Spanish Royal Academy], *available at* www.rae.es (last visited Feb. 24, 2011)), but the Brazilian Criminal Code uses the Portuguese word *estupro* as meaning rape. *Cf.* arts. 128 & 213 of *Código Penal Brasileiro*.

[49] SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 48 at 121 & 159.

[50] The U.S. delegate was much more influential in the matter of incitement to hatred and freedom of speech, since his proposition was accepted by the States of the OAS. Probably this happened because the delegate argued "that this amendment was very important to his delegation because it made the text consistent with the constitutional guarantee of free speech in his country" (*Id.* at 444). The U.S. delegate could not adduce such an important political argument in the issue of abortion, since the *Roe v. Wade* decision was rendered only in 1973. Roe v. Wade, 410 U.S. 113 (1973).

such a principle.[51] The Dominican Republic proposed copying the ICCPR's statement on the right to life, which does not make any reference to conception. This would have had the practical effect of suppressing the sentence "from the moment of conception,"[52] but according to the Dominican Republic, its rationale for proposing this was to strengthen "universal concepts."[53] Ecuador proposed suppressing the phrase "in general," thus protecting life from conception in every situation.[54]

Finally, the current wording of the Convention was approved by the majority of American States.[55] The result of 4(1) is not the rule proposed by the original drafts nor by Ecuador, so it allows exceptions to the protection of the right to life, which will be analyzed in the final section of this brief of *amici curiae*. However, the current text was considered by Venezuela as one which *made no concessions* to the existence of the right to life from the moment of conception.[56] This is why, despite Article 4(1)'s use of the phrase "in general," the *travaux préparatoires* enables the interpreter to affirm that the current wording of the Convention is more a *principled* than a *compromised* solution between the countries of the Americas.

1.3. Evolutive and *Pro Homine* Interpretations[57]

In the light of the above mentioned, it is clear that the Convention's text considers unborn children as persons and grants them the right to life. However, it could be speculated as to whether an evolutive or a *pro homine* interpretation may change this textual reading, making the right to life and its protection more restrictive, especially since the Court has in many cases supported the use of these interpretative tools.[58] This brief takes no stance on the contested

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[51] SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 48, at 159 & 160.

[52] *Id.*, at 57.

[53] *Id.* That the Dominican Republic did not have the same intentions as Brazil and the United States is also supported by the fact that it did not sign these two countries' interpretative declaration regarding the unborn. It must be noted that the current Constitution of the Dominican Republic asserts the inviolability of life from the moment of conception. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA, 2010, art. 37.

[54] SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 48 at 160.

[55] The *travaux préparatoires* give no details about the way in which each State delegate voted. *Id.* at 160.

[56] *Id.*, at 160.

[57] The Latin concept *pro homine* could be translated as "in favor or man" or "in favor of the person." The *pro homine* principle is a hermeneutical tool used in several jurisdictions, whereby norms are interpreted in the way most favorable to the human being, as long as this elucidation is consistent with the provision being interpreted.

[58] The Court asserts that evolutive interpretations are compatible with the rules of the VCLT. *Cf.* The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 114 & 115 (Oct. 1, 1999), and Interpretation

issue of the adequacy and extent of evolutive interpretation, but it refers to the main features of this system of elucidation to show that even under an evolutive interpretation, Article 4(1)'s protection of the right to life from conception remains unchanged.[59]

Evolutive interpretation is itself a developing concept "whose contours are as yet quite unclear."[60] However, there seems to be a consensus in international practice that, if a treaty were to evolve, it could only do so if it uses "evolutive terms"—that is, open-ended concepts—when determining the content of a particular right.[61] This method of interpretation may be used for extending the content of a right in a way which was not foreseen by the framers of a treaty, or for departing from previous precedents. However, evolutive interpretations cannot derive from international treaties "a right that was not included therein at the outset," especially when its "omission was deliberate."[62] *A fortiori*, they should not contravene the express wording of a treaty. Indeed, "[t]he only matter which can be evolutively interpreted—and perhaps thereby expanded into unforeseen fields of application—is a matter which is already explicit or implicit in the wording of the text."[63] This is why the Convention's explicit declaration of the right to life of the unborn could not be interpreted in a fashion that deprives embryos or fetuses of their personhood.

Even though the previous argument is conclusive, it should be borne in mind that evolutive interpretations of human rights treaties are always used to enlarge the application of rights established in international documents, never to reduce them. For instance, an evolutive

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of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R., (ser. A) No. 10, ¶ 37 (July 14, 1989). Before interpreting a treaty in an evolutive fashion it is necessary to determine whether it was framed as one suitable for evolutive interpretation. In doing so, the intention of the parties and the wording of the treaty should be analyzed. Arato, *supra* note 58 at 444. However, since the Court has already stated that the Pact of San José is suitable for an evolutive interpretation, this *amici curiae* will not dwell on this issue.

[59] There is no consensus within legal scholarship on the appropriateness of evolutive interpretations. For an opinion justifying originalist interpretations of International Law on the grounds of its creation via particular agreements *see* ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (2008). For an analysis within the Latin-American context *see*: Gabriel Mora Restrepo, Justicia constitucional y arbitrariedad de los jueces: Teoría de la legitimidad en la argumentación de las sentencias constitucionales (Marcial Pons ed., 2009).

[60] Arato, *supra* note 58 at 444 note 5, referring to an argument of Malgosia Fitzmaurice.

[61] *Id.* at 468. Arato also refers to a more contested rationale for evolution, one based in the object and purpose of a treaty. He considers that an evolution based on this rationale could only be used when it is *necessary* for giving effect to its object and purpose, and that "mere convenience" would be an insufficient rational, since it could lead not only to a "superfluous application of evolutive interpretation", but also could "seriously undermine certainty in the law of treaties, since anything could be judged to be evolutive." *Id.* at 476. However, even evolution based on the object and purpose of a treaty cannot go against the explicit wording of a treaty.

[62] Johnston and Others v. Ireland, 112 Eur. Ct. H.R. (Ser. A) ¶ 53 (1986).

[63] Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 66 (1990).

interpretation of the Convention may allow the Court to enlarge the list of procedural requirements that benefit a person who is under arrest, e.g., by including "the rights not to incriminate oneself and to have an attorney present when one speaks," but not to diminish them.[64] "Evolution downwards" is not accepted by those who favor progressive interpretations.[65] This is especially so when it comes to Article 4(1), since "[o]wing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible."[66] Therefore, developing interpretations of the Convention could only enhance protection of the right to life.[67]

Nevertheless, following what has been done in some domestic and international fora, it could be argued that interpreting the Convention as allowing abortion should not be understood as a restriction of the right to life, but as an enhancement of other guaranties, such as the respect of privacy and physical, mental, and moral integrity.[68] Indeed, some domestic courts and international bodies have asserted that abortion falls within the area free from the State's intervention created by the right to privacy.[69] However, in these fora the status of the unborn has not been as clearly stated as in the Pact of San José, which explicitly declares personhood from the moment of conception.[70] Even the European Court of Human Rights—whose founding instrument does not have a disposition tantamount to that of the Inter-American Court—has held that the regulation of abortion falls within the margin of appreciation of each

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[64] The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 117 (Oct. 1, 1999).

[65] Mahoney, *supra* note 63 at 66 & 67.

[66] "Street Children" (Villagrán-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999). In this case the Court also stated that the right to life is a fundamental right whose exercise "is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning." *Id.*

[67] Not only in regards to living conditions, as the Court has already stated, but also in regards to the very core of its meaning: the right to stay alive.

[68] Established in arts 11 & 5(1) of the ACHR.

[69] *E.g.*, the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). The reasoning in *Roe*, especially its privacy rationale, has been criticized even by supporters of abortion. *See*: John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade", 82 Yale L. J. 920 (1973); Cass Sunstein, "The Fate of Roe v. Wade and Choice", Boston Globe (Sept. 14, 2008). Even the U.S. pro-abortion Supreme Court Justice Ruth Bader Ginsburg has criticized the arguments of Roe as based on privacy. *See*: Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade", 63 N.C. L. Rev. 375, 376 (Jan. 1985): ("*Roe v. Wade* sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action.").

[70] If it would have been so, the decisions of these domestic and international courts would be different. For example, in *Roe v. Wade*, the Supreme Court asserted that if the Fourteenth Amendment would have suggested that the unborn had personhood, "the appellants case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." Roe v. Wade, 410 U.S. 113, 157 (1973). However, the Court continued by saying that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

country and, thus, is not subject to review by the Court.[71] Besides, according to the American Convention, the right to life is not a private matter, but something that a State's legislation must ensure. This provides for no doubt as to the extension of the right to privacy in relation to abortion. Indeed, it could be said that the Convention, foreseeing the different clash of rights theories, decided itself to balance rights in favor of the unborn.

Besides, evolutive or progressive interpretations do not rely exclusively on the open-endedness of the wording of a treaty. They also require an additional rationale, such as a change in circumstances due to new technological means, or international consensus on the obligations stemming from a particular right. In the issue of the unborn, if the former rationale is taken into account, it could be used precisely for stating that technological advancements, such as the improved knowledge of the DNA of the embryo, and the ever increasing reduction of the hazards involved in carrying a pregnancy to term could justify an evolving interpretation enhancing the right to life. This would narrow the exceptions accepted by the "in general" proviso. Similarly, the rationale of international consensus cannot be used for restricting the right to life either, since international trends do not necessarily coincide with those of Western Europe and North America.[72] Abortion laws have no clear direction in the member States of the OAS, since some regulations on abortion have become more liberal, as in the case of Mexico's Federal District, Colombia, or slightly more liberal, like such as Brazil and Argentina,[73] while others have become stricter, like those of Nicaragua, El Salvador, Chile and in some way

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[71] A, B & C v. Ireland (App. No. 25579/05) Eur. Ct. H.R. (Dec. 16, 2010). In Europe the nations of Ireland and Malta provide no system for procuring an abortion, and Poland has an extremely restrictive abortion law. It is worth noting that Art. 40(3)(3) of the Irish Constitution states: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." It is worth also noting that a very recent bill for legalizing abortion in Ireland was rejected by a large majority. In addition, in 2011 Hungary promulgated a new constitution that protects unborn life "from conception." Russia has also tightened its laws on abortion.

[72] However, even in the United States there has been a movement away from the extremely liberal abortion regime created by *Roe* and *Doe*, with the Supreme Court upholding waiting periods and restrictions on certain late-term methods of abortion. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 550 U.S. 124 (2007). *See* the discussion in Piero Tozzi, Neydy Casillas Padrón, and Sebastian Marcilese, "El Aborto en El Derecho Internacional y en la Jurisprudencia Panamericana, El Derecho No 12837 (19/9/2011).

[73] See Allison Ford, *Mexico City Legalizes Abortion*, 16 LAW & BUS. REV. AM. 119 (2010); Corte Constitucional [Constitutional Court], May. 10, 2006, Sentencia C-355/06 (Colom.), available in Spanish (with an English abstract) at http://english.corteconstitucional.gov.co/sentences/C-355-2006.php (last visited Feb 15, 2011) [hereinafter *Colombian Constitutional Court's abortion* decision]; Corte Suprema de Justicia de la Nación (Argentina), Mar. 13, 2012, Medida Autosatisfactiva F. 259, available at: http://www.csjn.gov.ar/om/img/f259.pdf (last visited April 23, 2012); and Regarding Brazil, s*ee*: http://g1.globo.com/brasil/noticia/2012/04/entenda-o-julgamento-do-supremo-sobre-aborto-de-fetos-sem-cerebro.html (last visited April 23, 2012). Regarding the Argentinean judgment *see also* Bach de Chazal, Ricardo, "'F., A. L.'. Cuando la Injusticia es Suprema, El Derecho Diario Política Criminal (24/04/2012).

those of the majority of the Mexican states.[74] However, these argumentations only complement the reasons described in previous paragraphs about why an evolutive interpretation against the unborn would not be appropriate.

On the other hand, something similar happens with the *pro homine* or pro person principle, which can never be used against the text of the Convention. The Inter-American Court has stated that the Convention must be interpreted "in favor of the individual, who is the object of international protection, *as long as such an interpretation does not result in a modification of the system.*"[75] Furthermore, this principle could be used for enlarging a right, but not for diminishing it. For instance, it could support that the right to be free from ex post facto criminal laws applies also to administrative laws establishing sanctions,[76] but the principle could not be used to restrict the right to only certain types of penal laws.

Notwithstanding the foregoing, some might wish to use the *pro homine* argument in order to affirm that the pregnant woman should take precedence over the unborn. However, this is a double-edged sword for abortion advocates, since it could be said that the Inter-American system allows no kind of abuse against a *person*, a term which clearly includes the unborn in the

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[74] In the case of Nicaragua, the total ban on abortion was established only in 2006 by a law derogating art. 165 of its former Penal Code. Law No. 603, Oct. 26, 2006, Ley de Derogación al Artículo 165 del Código Penal Vigente, La Gaceta, Diario Oficial [L.G.], Nov. 17, 2006, *available at* http://www.ccer.org.ni/files/doc/1186699362_Ley_de_Penalizaci%C3%B3n_del_AbortoCB461294.pdf (last visited Feb. 26, 2011). This ban was maintained in Nicaragua's new 2007 Penal Code. CÓD. PEN. arts. 143-145 (Nicar.). El Salvador's 1997 Penal Code abolished the legal exclusions to the penalization of abortion in the 1974 Penal Code. FRANCISCO MORENO CARRASCO & LUIS RUEDA GARCÍA, I CÓDIGO PENAL DE EL SALVADOR COMENTADO 531, http://www.cnj.gob.sv/index.php?view=article&catid=42:publicaciones&id=116:codigo-penal-de-el-salvador-comentado-&option=com_content&Itemid=12 (last visited Feb 15, 2011). Chile modified its Therapeutic Code in 1989 in order to abolish the permission to undertake an abortion when the life of the mother was threatened by pregnancy (CÓDIGO SANITARIO [Therapeutic Code] art. 119 (1931), http://www.leychile.cl/Navegar?idNorma=5595 (last visited Feb. 15, 2011)) (both the legal permission of abortion in this circumstance in 1931, and the reintroduction of its prohibition in 1989, were not approved by a Parliament elected by the people, since in 1931 the Sanitary Code was approved by the so-called *Congreso Termal*, during what is referred as the dictatorship of President General Carlos Ibáñez del Campo, and in the year 1989 they were approved by the Junta). Also in Chile, a law enshrining the protection of life from the moment of conception was recently promulgated (Law No. 20.120, Sept. 7, 2006, Sobre la Investigación Científica en el Ser Humano, Su Genoma, y Prohíbe la Clonación Humana, Diario Oficial [D.O.], Sept. 22, 2006). The enactment of a law authorizing the distribution in Chile of the so called *morning after pill* was based on the understanding—so says the law—that this method does not cause abortions (Art. 4, Law No. 20.418, Jan. 18, 2010, Fija Normas sobre Información, Orientación y Prestaciones en Materia de Regulación de la Fertilidad, Diario Oficial [D.O.], Jan. 28, 2010). The Honduran Criminal Code was modified in 1983 to allow certain exceptions to the criminalization of abortion, but this modification was repealed in 1985, before these new provisions came into force. 2 UNITED NATIONS, ABORTION POLICIES: A GLOBAL REVIEW, ST/ESA/SER.A/191 49 (2001). As noted above, a majority of Mexican states have now passed state constitutional amendments protecting unborn life. The Suprema Corte de Justicia de la Nación last year upheld the compatibility of these state amendments with the federal constitution of Mexico. Acción de Inconstitutionalidad 11/2009.

[75] In the matter of Viviana Gallardo et al., Decision, Inter-Am. Ct. H.R. (ser. A) No. G 101/81, ¶ 16 (Nov. 13, 1981). No emphasis made in the original.

[76] As the Court did in Baena et al. v. Panama, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶¶ 106 y 107 (Feb. 2, 2001), even though it made no explicit reference to a *pro homine* interpretation.

Pact of San José. Therefore, it could end up forbidding every form of abortion. An example of this approach is given by the Chilean Constitutional Court, which quoted the Inter-American Court's use of the *pro homine* principle when determining that the *morning after pill* could not be legally distributed in public medical centers. This tribunal's reasoning began by noting that there was a reasonable doubt in the scientific community about whether life began at conception or at implantation, and thus, about whether one of the effects of the *morning after pill* would be to put an end to the life of a human being. Then, the Constitutional Court considered that the *pro homine* principle required the adjudicator to take a position that would not jeopardize the life of what could be a person.[77] The Peruvian Constitutional Tribunal has adopted a similar reasoning, but based on the principle of precaution.[78].

1.4. Interpretative Declarations

When voting on Article 4(1), Brazil and the United States agreed to introduce the following declaration, originally written in English: "The United States and Brazil interpret the language of paragraph 1 of Article 4 as preserving to State Parties discretion with respect to the content of legislation in the light of their own social development, experience and similar factors."[79] This declaration expresses that both countries should have the freedom to interpret the right to life in the way they consider most appropriate. Since it refers broadly to Article 4(1), it would extend not only to the beginning of personhood from the moment of conception, but to several other important issues regarding the most basic of all rights.[80] According to the wide framing of the declaration of Brazil and the United States, it would be permissible for a State to consider, in light of its own "social development", that not every person—either born or unborn—has the right to have his life respected. The *travaux préparatoires* do not record how

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[77] Tribunal Constitucional [T.C.] [Constitutional Court], Apr. 18, 2008, Sentencia 740-07-CDS, at 118, 119 & especially 140-142, available in Spanish at http://www.tribunalconstitucional.cl/index.php/sentencias/download /pdf/914 (last visited Aug. 12, 2011) (the referred page numbers are taken from the document in PDF available in this tribunal's website). After this decision, the law was modified in order to allow the distribution of the *morning after pill*. This legal permission was given in the understanding that this method was not abortive (the law explicitly states the illegality of any method intending to produce an abortion). Law No. 20.418, Jan. 18, 2010, Fija Normas sobre Información, Orientación y Prestaciones en Materia de Regulación de la Fertilidad, Diario Oficial [D.O.], Jan. 28, 2010.

[78] Sentencia del Tribunal Constitucional, Oct. 16, 2009, Exp. N°. 02005-2009-PA/TC (Peru), ¶¶ 48-52, available in Spanish at http://www.tc.gob.pe/jurisprudencia/2009/02005-2009-AA.html (last visited Oct. 24, 11).

[79] SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 48 at 441.

[80] It would extend to the protection of life by law; to the moment when life begins; and to the arbitrary deprivation of life.

other States responded to this declaration. However, the relevance of this declaration is very limited, since the United States is not a party to the Convention and Brazil did not ratify its statement when it became a member State.[81] This declaration lacks importance for general interpretative purposes.

Almost thirty years later, Mexico ratified the Convention with the following interpretative declaration: "With respect to Article 4, paragraph 1, the Government of Mexico considers that the expression 'in general' does not constitute an obligation to adopt or keep in force legislation to protect life 'from the moment of conception', since this matter falls within the domain reserved to the States." The text of this declaration does not set birth as a time limit for this country's freedom to "adopt or keep in force legislation to protect life." However, Mexico's intention when issuing this declaration was only to assert its freedom to legislate on abortion, and not to be excluded from the obligation to protect the life of born people.[82] It could be argued that this "declaration" was motivated by Mexico's respect for the integrity of its federalist Constitution, which reserved penal law matters to the Mexican states.[83]

As we have seen, the intention of Article 4(1) is to grant personhood from the moment of conception and to require States to protect the life of the *nasciturus* by law as a general rule. On its turn, Mexico uses its declaration to try to avoid reforming its legal system on the issue of the unborn—which could serve as evidence that Mexico interpreted that the Convention's banned abortion outright. Thus, this declaration intends to change the scope of the obligation stemming out of Article 4(1). When interpretative declarations are aimed at doing so, "they cease to be declarations and become reservations."[84] Therefore, Mexico's nominal "declaration" is in fact a reservation, which should undergo scrutiny of its contents if a relevant case is brought to the Court.[85] Something of this nature occurred in the European Court of Human Rights—

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[81] When becoming a member of the American Convention, Brazil made an interpretative declaration that does not refer to art. 4(1). The legal status of Brazil's former declaration is a theme which goes beyond the scope of this work. However, it is important to consider that "[i]f formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty." Art. 23(2) VCLT.

[82] No author seems to have ever argued that the Convention could allow the endorsing of theories such as those of Kuhse and Singer, previously referred to. *Supra* note 16.

[83] The reservation of penal law matters to the states is established in Const. [México] Art. 124. Thus, it could be argued that Mexico could not agree to a treaty that would restrict the states' ability to legislate on the matter, either in the a direction more protective of life (a majority of Mexican states have done) or one less protective (as one jurisdiction, the Mexico City federal district, has done).

[84] Fitzmaurice, *supra* note 42 at 208. Regarding reservations to the Convention see Andrés E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. U. INT'L L. REV. 269 (2001).

[85] Art. 75 of the American Convention establishes that it "shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969." In

another regional international body with an "institutionalized procedure to decide upon the permissibility of reservations,"—, which had to decide upon the validity of parts of the declarations of two members to the European Convention on Human Rights. [86]

"The purpose of the Convention imposes real limits on the effect that reservations to it can have,"[87] while reservations to the Convention "have to be interpreted in a manner that is most consistent with [the Convention's] object and purpose."[88] Furthermore, per the Vienna Convention, reservations may not be incompatible with the object and purpose of the treaty.[89] Therefore, if the Inter-American Court is faced with the application of this declaration, it should analyze the broadness of the reservation, and whether it is compatible with the object and purpose of the Convention, in accordance with the leeway that it has or has not given to States in previous instances.[90] The Court should consider that Mexico's declaration to Article 4(1) refers to what this very State has called the "most fundamental of human rights."[91] In any case, this declaration could have effect only with respect to Mexico. Nevertheless, it cannot be used as a tool for interpreting the Convention itself.

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relation to Article 20 VCLT (entitled "Acceptance of and Objection to Reservations"), the Court has stated that only the first paragraph is applicable. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶¶ 27-35 (Sept. 24, 1982).

[86] The quote is from Fitzmaurice, *supra* note 42 at 207. The situation described happened in *Belilos v. Switzerland* and in *Loizidou v. Turkey*. The Court considered these declarations to be invalid. Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A) ¶¶ 51-60 (1988), and Loizidou v. Turkey 310 Eur. Ct. H.R. (ser. A) ¶¶ 15, 27, 89, 90 & 95-8 (1995).

[87] Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 65 (Sept. 24, 1982).

[88] *Id.*

[89] Art. 19(c) VCLT.

[90] In a case involving a broad reservation concerning the death penalty, the Court "examined and dismissed—in part—the effectiveness of the reservation or limited declaration formulated by Trinidad and Tobago, finding that due to its excessively general character it runs contrary to the object and purpose of the Convention, and broadly subordinates the jurisdictional function of the Court to domestic norms and to the decisions of national organs, thereby contravening principles of international law." Concurring separate opinion of Judge Sergio García Ramírez in Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 2 (June 21, 2002) (footnotes omitted). Some judges are contrary to reservations made regarding non-derogable norms of the Convention, such as Judge Cançado Trindade, who in the *Caesar v. Trinidad and Tobago* case strongly rejected any reservation in the matter of the right to life. *Cfr.*, Caesar v. Trinidad and Tobago, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 23 (Mar. 11, 2005). The United Nations Human Rights Committee [UNHRC] has a similar opinion regarding reservations. UNHRC, GENERAL COMMENT NO. 24: ISSUES RELATING TO RESERVATIONS MADE UPON RATIFICATION OR ACCESSION TO THE COVENANT OR THE OPTIONAL PROTOCOLS THERETO, OR IN RELATION TO DECLARATIONS UNDER ARTICLE 41 OF THE COVENANT ¶¶ 6-12 (1994), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/69c55b086f72957ec12563ed004ecf7a?Opendocument (last visited Mar. 4, 2011).

[91] The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 26 (Oct. 1, 1999).

2. Interpretation Given by the Commission

Until now, the Court has not directly addressed the issue of the unborn, but the Commission has done so when deciding on particular petitions and when issuing some general or country-oriented recommendations. In the latter, the Commission has adopted a position contrary to laws banning abortion in every situation,[92] which has probably influenced the domestic legislation of some OAS member States.[93] These non-binding statements focus on peripheral provisions of the American Convention while seemingly ignoring Article 4. Indeed, these general recommendations give no details about how the Commission reaches its conclusions or what role is played by Article 4(1) in this body's decision. Hence, this brief of *amici curiae* will mainly deal with what the Commission has said in its particular cases, since it is there where this body explains its assertions in more detail.

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[92] *E.g., see* INTER-AM. CMM'N. H.R., THIRD REP. ON THE HUM. RTS. SITUATION IN COLOMBIA, OEA/Ser.L/V/II.102, Doc. 9, rev. 1 (Feb. 26, 1999), Chapter XII, ¶¶ 49-51, *available at* http://www.cidh.oas.org/countryrep/Colom99en/table%20of%20contents.htm (last visited Feb. 7, 2011). In INTER-AM. CMM'N. H.R., FIFTH REP. ON THE SITUATION OF HUM. RTS. IN GUATEMALA, OEA/Ser.L/V/II.111, Doc. 21 rev. (Apr. 6, 2001), ¶ 39 of chapter XIII, *available at* http://www.cidh.org/countryrep/guate01eng/TOC.htm (last visited May 14, 2011), the Commission seems to have a negative view of Guatemala's prohibition of abortion, which only admits termination of pregnancies when they are indispensable to save the mother's life. The Commission's stance towards abortion may also be drawn out from documents which have no explicit negative consideration of restrictions to the termination of pregnancies, but in which this body refers to abortion amongst other women's rights, e.g.: INTER-AM. CMM'N. H.R., ACCESS TO MATERNAL HEALTH SERVICES FROM A HUMAN RIGHTS PERSPECTIVE, OEA/Ser.L/V/II, Doc. 69 (June 7, 2010), ¶ 42, *available at* http://www.cidh.org/women/saludmaterna10eng/MaternalHealth2010.pdf (last visited Feb. 11, 2011) (referring to abortion "in terms of women's human rights to integrity and privacy").

[93] E.g. the THIRD REP. ON THE HUM. RTS. SITUATION IN COLOMBIA (*supra* note 93) was referred to when this country's Constitutional Court was called to decide whether to put an end to Colombia's blanket legal prohibition on abortion. In this case, the Commission's report is referred to in the arguments of the General Attorney, who asked the Court to uphold the ban on abortion, while allowing certain exceptions (the decision mistakenly refers to the Inter-American *Committee* on Human Rights) (*Colombian Constitutional Court's abortion decision*, *supra* note 73, at 177 & 178. The page numbers cited in this article are those of the document uploaded to the website of the Constitutional Court). It is also mentioned in the opinions—either concurring or dissenting—of judges Monroy and Escobar (the former is the same who issued a dissenting opinion in the *"Baby Boy" case*, while the latter now is a member of the Commission), Cepeda and Tafur (*Id.* at 562, 395 & 655, respectively). The Constitutional Court's majority position put an end to Colombia's blanket prohibition on abortion. This decision has been criticized by many authors, e.g. Piero Tozzi, Neydy Casillas Padrón, and Sebastian Marcilese, "El Aborto en El Derecho Internacional y en la Jurisprudencia Panamericana, El Derecho No 12837 (19/9/2011), and Gabriel Mora Restrepo, Justicia constitucional y arbitrariedad de los jueces: Teoría de la legitimidad en la argumentación de las sentencias constitucionales (Marcial Pons ed., 2009).

2.1. The *"Baby Boy" Case*

The *"Baby Boy" case* refers to a petition filed against the United States before the Inter-American Commission.[94] This country is not subject to the jurisdiction of the regional court of the Americas, but during the time when the *"Baby Boy" case* was being analyzed, this State considered the possibility of ratifying the Convention.[95] Nevertheless, since the United States is a member of the OAS, a system in which the Commission ought "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization" in these matters, this body decided to study this case.[96] In "*Baby Boy*" the Commission asserted its jurisdiction to apply the American Declaration as substantive law to all member States of the OAS.[97]

The facts of the case were as follows: in 1973 a Massachusetts court found a physician guilty of manslaughter for performing the duly requested abortion of a "child [who] was such as to fit within a 'protectable exception' (over six months past conception and/or alive outside the womb) to the Supreme Court of the United States' rubric in the [Roe v.] Wade and [Doe v.] Bolton cases."[98] On appeal, the Supreme Judicial Court of Massachusetts subsequently reversed this decision on three grounds: insufficient evidence of recklessness and belief in the viability of the fetus, insufficient evidence of life outside the womb, and procedural error.[99] The petitioners considered that this decision violated the American Declaration of the Rights and Duties of Man. There was no controversy concerning the facts of the case.[100]

Several issues of admissibility were discussed in this case, but "the seemingly fundamental question of whether the fetal 'Baby Boy', on whose behalf the petition [was]

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[94] *Supra* note 47.

[95] *See* Alston, *supra* note 18 at 176, and *"Baby Boy" case* ¶ 1.

[96] Art. 106, *Charter of the OAS*. One of the Inter-Am. Cmm'n. H.R.'s powers is "to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights." OAS, STATUTE OF THE INTER-AM. CMM'N. H.R., AG/RES. 447, art. 18(b) (Oct., 1979).

[97] Shelton, *supra* note 8 at 313. Furthermore, the Inter-American Court has stated that, for member States of the OAS "the Declaration is the text that defines the human rights referred to in the Charter [of the OAS]. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization." Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R., (ser. A) No. 10, ¶ 45 (July 14, 1989).

[98] *"Baby Boy" case*, ¶ 3(d).

[99] *Id.*

[100] *Id.*, "Whereas" ¶ 7.

brought, [was] a 'person' for purposes of jurisdiction [was] totally ignored."[101] "It was simply taken as true that a 'person' had been subject to an alleged violation, leaving open the possibility that other cases of fetal injury or death may be brought based on this jurisdictional precedent."[102] This conveys the idea that "the fetus is a 'person' for jurisdictional purposes."[103] Something analogous occurred in an individual's case against Canada about freedom of speech of a pro-life campaigner.[104] Furthermore, in its application to the *Xákmok Kásek Indigenous Community v. Paraguay case*,[105] the Commission goes even further, by giving the label "person" to each one of the two unborn who died together with other members of the Indigenous Community.[106] This could be read not only as considering the unborn to be a person for jurisdictional purposes, but also as entitled to rights according to the Convention.

In the *"Baby Boy" case,* the Commission analyzed both the Declaration and the Convention in light of their *travaux préparatoires*, but dismissed other interpretative methods for elucidating the meaning of these instruments' provisions. This was particularly so when it referred to the Convention. After doing so, the Commission concluded with five votes against two, that the decision of the Massachusetts' Supreme Court did not violate the American Declaration. Among the majority was the *Rapporteur* who years earlier recommended to exclude from the Convention the notion of conception.[107] The most probable explanation for this decision was the text of the Declaration, which allows a more flexible interpretation of the right to life than the Convention; for instance, it remains silent in regards to the death penalty.[108] An

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[101] Shelton, *supra* note 8 at 312.

[102] *Id.* at 312.

[103] *Id.* at 312.

[104] In this case the petitioner also claimed the violation of some rights of unborn children and their mothers. However, these claims were considered inadmissible because petitions to the Commission are not intended to be *actio popularis*, and therefore, should not be presented *in abstracto*. The Commission did not assert the unborn children's lack of personhood. It made no juridical distinction between the unborn and their mothers. Demers against Canada, Petition P-225-04, Inter-Am. Comm'n H.R., Report No. 85/06, Decision on Admissibility, ¶¶ 41 & 42 (2006), *available at* http://www.cidh.oas.org/annualrep/2006eng/CANADA.225.04eng.htm (last visited Mar. 3, 2011).

[105] Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 214 (Aug. 24, 2010).

[106] The Commission does so in accordance with the will of the Community's representatives. However, in doing so, this body endorsed the Xákmok Kásek's claim regarding the unborn. Inter-Am. Comm'n H.R., Application with the Inter-American Court of Human Rights in the case of Xákmok Kásek Indigenous Cmty. of the Enxet-Lengua People and Its Members (Case 12,420) against the Republic of Paraguay ¶ 105 (2009), *available at* http://www.cidh.oas.org/demandas/12.420%20Xakmok%20Kasek%20Paraguay%203jul09% 20ENG.pdf (last visited Mar. 4, 2011).

[107] Carlos Dunshee de Abranches. GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, *supra* note 13 at 193.

[108] Its prohibition of "cruel, infamous or unusual punishment" (art. XXVI) did not intend to include the death penalty.

earlier draft of the Declaration used to have an explicit reference to "the right to life from the moment of conception, to the right to life of incurables, imbeciles and the insane," but this instrument's *travaux préparatoires* do not explain why this explicit reference was suppressed.[109] The two dissenting opinions considered that the Declaration intended to protect life from the moment of conception.[110]

The Commission also asserted, in a kind of *obiter dicta*, that the Convention's sentence "in general, from the moment of conception", did not mean "that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogota, when they approved the American Declaration."[111] This *obiter dicta* is contrary to what had been previously stated by the Commissioner Tom J. Farer—who was among the majority—when issuing a congressional testimony about the Pact of San José in 1979, where he said that "the United States should refuse to accept Article four's *categorical preclusion* of abortion."[112] Similarly, this *obiter dicta* does not seem to equate with Commissioner Andrés Aguilar's understanding, since his concurring opinion stressed that he had reached his decision only because the United States should not be judged in the light of the Convention, but only in that of the American Declaration, which allows each State to regulate the issue of the protection of life before birth.[113] He also stressed

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[109] Shelton, *supra* note 8 at 313-4. Similarly, Dr. Tinoco argues in his dissenting opinion: "I do not find . . . any specific explanation of the reasons that motivated the elimination of the supplementary phrase contained in the Draft Declaration of the International Rights and Duties of Man presented by the Inter-American Juridical Committee (Document CB-7), which recognized 'the right to life for all persons, including (a) the unborn, as well as (a) [sic] incurables, imbeciles, and the insane.' For which reason I must deduce that the reason for that elimination was none other than that expressed by the *Rapporteur*, Mr. Lopez de Mesa, in these terms: 'likewise, it was decided to draft them (the rights and duties) in their mere essence, without exemplary or restrictive listings, which carry with them the risk of useless diffusion and of the dangerous confusion of their limits'." *"Baby Boy" case*, Dissenting Opinion of Dr. Luis Tinoco C., ¶ 3. The majority's position in the *"Baby Boy" case* disagrees with this assertion by arguing that it was modified in order to make it compatible with domestic laws governing abortion and capital punishment (*"Baby Boy" case*, "Whereas" ¶ 19, which appears as part of ¶ 18 in the online version). However, this latter assertion does not explain why the protection of incurables, imbeciles and the insane was also taken out of the Declaration. Similarly, if the framers of the Declaration wanted to make this instrument compatible with domestic legislation on the issue of capital punishment, they would have maintained the Draft's reference to the possibility of applying capital punishment "in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity," since the current wording leaves an absolute formulation of the right to life (*Cf. Id.* (b)). It seems that the reasons for reformulating Article I of the American Declaration are not as straightforward as the Commission portrayed them to be, and that they are not clear enough in the *travaux préparatoires*. A similar language to that of the draft Declaration was also put forward by Chile when debating the Universal Declaration of Human Rights. Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27, 36 (2003).

[110] The dissenting commissioners were Marco Gerardo Monroy Cabra and Luis Demetrio Tinoco Castro.

[111] *"Baby Boy" case*, "Whereas" ¶ 30.

[112] Quoted in Alston, *supra* note 18 at 176 & 177 (no emphasis in the original).

[113] *"Baby Boy" case*, Concurring decision of Dr. Andrés Aguilar M., ¶¶ 4, 5 & particularly 7.

"that human life begins at the very moment of conception and ought to warrant complete protection from that moment, both in domestic law as well as international law."[114]

2.2. Other Cases

A more recent case regarding abortion is the petition of *Paulina del Carmen Ramírez Jacinto against Mexico*.[115] The applicants of this case were NGOs who alleged the violation of several articles of various international conventions. The facts concerned a minor who was pregnant as a consequence of rape. She, with the consent of her mother, tried to have an abortion according to the laws of the Mexican state of Baja California. However, many obstacles were set against the performance of this legal action, to the effect that the applicant gave birth to her child, Isaac de Jesús.

México and Paulina Ramírez settled this case with an agreement, whereby the State acknowledged its responsibility for not implementing an adequate procedure for enabling women to perform abortions which are authorized by law, and in which it agreed to create and implement these procedures, and pay some monetary compensation to both Paulina Ramírez and her child.[116] Noticeably, this case does not refer to the issue of whether abortion is permissible or required according to the Convention, but rather to the admissibility of obstacles to the performance of legally accepted abortions. Therefore, the Commission did not explicitly develop its understanding on the status of the unborn.[117]

On February 26, 2010, the Inter-American Commission issued a precautionary measure against Nicaragua in the matter of "Amelia."[118] This case referred to a pregnant woman who was denied the necessary medical assistance for treating a cancer. The reason for denying this treatment was that a chemotherapy or radiotherapy could provoke an abortion. Thus, the Commission requested the State to adopt the necessary measures for assuring that "Amelia" would receive the relevant medical treatment. Within the five days deadline the State of

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[114] *Id.*, ¶ 8.

[115] Ramírez Jacinto against Mexico, Petition 161-02, Inter-Am. Comm'n H.R., Report No. 21/07, Friendly Settlement (2007), *available at* https://cidh.oas.org/annualrep/2007eng/Mexico161.02eng.htm (last visited Feb. 27, 2011).

[116] The text of the public recognition of responsibility published in an official Mexican newspaper is appended to Ramírez Jacinto against Mexico, Report No. 21/07, Inter-Am. Comm'n H.R.

[117] The Commission makes a reference to women's rights and the Belém do Pará Convention, but makes no statement about the unborn. *Id.*, ¶ 19.

[118] "Amelia," Nicaragua, PM No. 43-10, 2010, Inter-Am. Comm'n H.R. Available at http://www.cidh.oas.org/medidas/2010.eng.htm (last visited Sept. 2, 2011).

Nicaragua informed the Commission that the requested treatment had already been initiated. This was a case in which physicians in Nicaragua refused to perform a *legal* medical intervention. Indeed, this State's legislation proscribes every form of direct termination of pregnancies, but abortions occurring as the consequence of indispensable and urgent therapeutic interventions for saving the life of the mother, without the direct killing of the unborn, are allowed by the law. This brief will refer later on to the distinction between direct and indirect abortions.

The Commission's most recent report in the matter of the unborn is the one that gave rise to this case, *Gretel Artavia et al. v. Costa Rica*. This report is an answer to several claims against the prohibition of in vitro fertilization in Costa Rica,[119] prohibition which was established by a judgment of this country's Supreme Court. This highest tribunal stated that in vitro fertilizations currently involve the death of a high proportion of embryos, constituting a violation of the right to life.[120] It is interesting to consider that the judge who delivered the opinion of the Costa Rican Supreme Court was Rodolfo Piza Escalante, a former President of the Inter-American tribunal who deemed this judgment to be in accordance with the Pact of San José.

The Inter-American Commission considered that this decision violated the following Articles of the Convention: 11(2) (to private and family life), 17 (2) (to raise a family), and 24 (equality before the law and equal protection of the laws), in relation to the general obligations established in Articles 1.1 and 2.[121] The Commission's report did not analyze the content of Article 4(1), despite the fact that Costa Rica's defense was mainly based on this right. Regarding this Article, the Commission only asserted that the State had a legitimate aim in general terms, consisting in the protection of a legal good such as life.[122]

The Commission studied in detail whether Costa Rica's prohibition violated the rights established in Articles 11, 17 and 24. When analyzing whether the restriction of the first two rights was adequate, this body stated that the measure of prohibiting in vitro fertilizations fulfilled the requirements of legality, legitimate aim, and adequacy, but that there were less

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[119] Gretel Artavia Murillo et al. y Otros (Fertilización *in vitro*) (in Spanish), Costa Rica, Report No. 85/10, Decision on the Merits, Case 12.361, 2010, Inter-Am. Comm'n H.R.

[120] *Supra* note 29, especially "Considerando" IX. The Supreme Court also asserted that "The human embryo is a person from the moment of conception" (author's translation). *Id.* "Considerando" IX.

[121] Gretel Artavia Murillo et Al. (*In Vitro* Fertilization), Costa Rica, Case 12.361, Inter-Am. Comm'n H.R., Report No. 85/10, Decision (2010).

[122] *Id.*, ¶ 96.

restrictive ways of satisfying the State's objective.[123] When deciding this, the Commission took into consideration that Costa Rica, while not the only nation of the Continent protecting the embryo, is the only one banning this technique.[124] Regarding Article 24, the Commission asserted that Costa Rica's decision had prevented the victims from using scientific progress for overcoming their disadvantaged situation, and that it had a disproportionate impact regarding women.[125] There were three dissenting opinions to the Commission's reading of Article 24, including that of the President and of the Second Vice-President of the Commission.

The report against Costa Rica does not explain in detail the Inter-American Commission's reading of Article 4(1), but it shows that this body does not agree with laws which, under the rationale of defending of the unborn, forbid the performance of actions which are widely accepted among the American States.

After being notified of the Commission's report, the Costa Rican Government presented a bill aimed at avoiding the filing of an application before the Court.[126] This bill allowed in vitro fertilizations in a very particular fashion, trying to make this procedure as compatible as possible with Costa Rica's traditional position towards life—position which was even expressed during the drafting of the Convention, when it strongly opposed the death penalty.[127] However, the Costa Rican Parliament rejected this bill. Hence, the Commission brought the matter before the Inter-American tribunal.

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[123] *Id.*, ¶ 110.

[124] *Id.*, ¶ 100. The Constitution of the Mexican state of Nayarit contains a provision which declares and ensures the right to life from the moment of natural *or artificial* fertilization. CONSTITUCIÓN POLÍTICA DEL ESTADO LIBRE Y SOBERANO DE NAYARIT, 1918, art. 7(XIII)(1) (no emphasis in the original). This provision was introduced in a constitutional reform of 2009. Regarding the issue of a widespread consensus in a particular matter, the European Court stated, when upholding Ireland's broad protection of the unborn's life, that: "consensus cannot be a decisive factor in the Court's examination." A, B & C v. Ireland (App. No. 25579/05) Eur. Ct. H.R. (Dec. 16, 2010) ¶ 237.

[125] Gretel Artavia Murillo et Al. (*In Vitro* Fertilization), Report No. 85/10, *supra* note 1, ¶ 128.

[126] *Costa Rica presenta ley de fecundación in vitro para evitar juicio*, AL DÍA (Oct. 22, 2010) http://www.pontealdia.com/america-latina/costa-rica-presenta-ley-de-fecundacion-in-vitro-para-evitar-juicio.h tml (last visited Feb. 27, 2011) (Philadelphia PA.).

[127] Costa Rica abstained from voting for the Convention's provision allowing capital punishment in exceptional circumstances, and expressed its desire of a total abolition of this practice in the Americas. SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 48 at 162. Costa Rica also declared its "unyielding adhesion to the principle of inviolability of human life" and its non-acceptance of dispositions which "do not tend to ensure, in an absolute fashion, this sacred principle." *Id.* at 441. Author's translation from the original Spanish version.

2.3. Commission's Overall Approach

The Commission seems to grant the unborn legal personality for jurisdictional purposes, as can be observed in petitions presented before this body.[128] It also seems to endorse the unborn's capability of being injured by third parties.[129] Nevertheless, the Commission seems to grant States a wide margin of appreciation for determining the protection given to the unborn. However, this latitude on the part of the Commission appears to have some exceptions, as has been shown in some general documents, country reports, and in the Costa Rican case. Indeed, the Commission does not agree with laws forbidding the performance of actions which are widely accepted within the Americas, such as in vitro fertilizations and abortions in certain serious, exceptional cases, e.g. when the mother's life is at risk. So far, the Commission's country reports do not explain sufficiently this body's rationale for recommending countries to refrain from prohibiting abortion in every situation.[130]

However, the Commission's opinion in this matter is not conclusive, since the Inter-American tribunal is the body which sets the definitive interpretation of international instruments of human rights in this regional system. When doing so "the Court cannot easily borrow legitimation of its interpretations" from the Inter-American Commission, because "the Court's opinions generally treat the Commission as a hierarchical subordinate that proposes arguments for the Court's consideration, rather than as an independent source of expertise on the elaboration of human rights norms."[131] In fact, the Inter-American tribunal often rejects the Commission's findings, and it has disagreed with some of this body's interpretations of the Convention.[132]

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[128] "*Baby Boy" case* and Demers against Canada, Petition P-225-04, Inter-Am. Comm'n H.R., Report No. 85/06, Decision on Admissibility.

[129] As can be observed in the Commission's presentation in the *Xákmok case*.

[130] The Commission explains it by briefly mentioning some rights, such as personal integrity and privacy, but does not take into consideration other relevant norms, notably the reference to the *nasciturus* in Article 4.1.

[131] Gerald L. Neuman, *Import, Export and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 108 (2008).

[132] E.g. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5 (Nov. 13, 1985).

3. Extent of the Phrase "In General"

This brief of *amici curiae* has shown the Convention's intention to grant personhood from the moment of conception and to require States to protect, as a general rule, the unborn's life by law. Until now, this brief has not elucidated the meaning of the expression "in general." Before interpreting this phrase, it should be borne in mind that when the Pact of San José allows exceptions to the legal protection of the unborn, it is not stating that States have no duty to protect life through other actions, such as administrative ones. In fact, the latter should be the case, especially by ensuring appropriate maternity care.

In order to give more clarity to its interpretation of Article 4(1), this brief will provide examples with the issue of abortion and its prohibition, since this is the most common topic relating to this norm. Nevertheless, the interpretation made of Article 4.1 would be applicable to all conceived human beings, regardless of whether they are inside or outside their mothers' wombs.

3.1. Preliminary Issue

Some may argue that a prohibition on abortion is not necessary for protecting life by law and generally from the moment of conception, since alternative means of protection could be used. A similar issue was analyzed by the German Federal Constitutional Court when undergoing an abstract judicial review of a bill in 1975 and another in 1993.[133] This tribunal considered that the German Basic Law allowed the legislator to define circumstances in which a woman should not be obliged to carry a pregnancy to its conclusion, but stated in the 1993 case that the standard of minimal protection of the unborn required:

> . . . . that abortion be declared illegal [as a general rule] during all stages of pregnancy [citing *Abortion I*]. If the law does not declare abortion to be illegal, the unborn child's right to life would be

[133] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 1, and BVerfG, 1993, 88 BVerfGE 203, both *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 336-48 & 349-56, respectively (2nd ed. 1997). These decisions in their original language use at times the expressions *Kind* (child) or *ungeborenen Kindes* (unborn child) for referring to the unborn.

> trumped by the legally unrestrained decision of the mother or other third party, and the legal protection of its life would no longer be guaranteed.[134]

The German Federal Constitutional Court considered that the process of loosening restrictive abortion laws, no matter how humane its motivations, is usually interpreted as an entitlement to the procurement of abortions.[135] Interestingly enough, this court did so despite the German Basic Law's lack of an explicit reference to unborn children or to the protection of their life by law, issues in which the American Convention is clear and direct.

The German Federal Constitutional Court's position is at odds with those who opine that "unrestrictive abortion laws do not predict a high incidence of abortion, and by the same token, highly restrictive abortion laws are not associated with low abortion incidence."[136] However, the latter consideration's accuracy does not make the German Court's assertion less convincing, since it is true that restrictive abortion laws may not predict low rates of termination of pregnancies, but this does not mean that a legal prohibition has no effect on the reduction of abortion rates. Indeed, evidence seems to show that restrictive abortion laws have the effect of reducing the number of pregnancy terminations performed in a given region.[137]

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[134] *Id.* at 352 & 353 (brackets in the original). This Court also required the State to take positive action in order to encourage the mother to carry her child to term. After doing so, it analyzed the rest of the bill which was being abstractly reviewed, and determined which exceptions to the right to life were permissible under the German Basic Law. However, contrary to what is allowed by the ACHR, the German Court considered admissible a wide range of exceptions to the prohibition of abortion.

[135] In several cases the Inter-American Court has upheld the deterrent effect of penalties. For instance, it does so when upholding the duty to investigate and, if appropriate, punish author of a human rights violation.

[136] Gilda Sedgh et al., Guttmacher Institute, and Elisabeth Åhman & Iqbal H. Shah, World Health Organization, *Induced Abortion: Estimated Rates and Trends Worldwide*, 370 LANCET 1338, 1343 (2007). This assertion is based on a comparison of the abortion rates between countries with and without restrictive abortion laws. Regarding some methodological problems regarding faulty definitions of "Abortion," "Safe Abortion," and "Unsafe Abortion" in Reproductive Health Indicators for Global Monitoring *see*: Donna J. Harrison, "Removing the Roadblocks from Achieving MDG 5 by Improving the Data on Maternal Mortality: How Faulty Definitions of 'Abortion,' 'Safe Abortion,' and 'Unsafe Abortion' in Reproductive Health Indicators for Global Monitoring Lead to Miscalculating the Causes of Maternal Mortality", International Organizations Research Group, Briefing Paper No. 5, May 1, 2009, available at: http://www.c-fam.org/docLib/20090514_Removing_the_Roadblocksfinal.pdf (last visited: April 10, 2012).

[137] To properly analyze the effect of abortion laws on the reduction of the number of pregnancy terminations, one cannot simply compare countries with and without restrictive abortion laws. Comparisons between countries with and without this kind of regulation should be done—as far as possible—in all-other-things-being-equal conditions. A study which is not set in *ceteris paribus* conditions could be dismissing other factors which may have an influence on the analysis. Therefore, in order to understand the effects of restrictive abortion laws a study should compare countries or regions with contrary positions on abortion, but sharing similar conditions in other areas. If comparisons are made on these terms, it seems that regions with restrictive abortion laws have lower rates of termination of pregnancies. For instance, if regions are distinguished on the basis of socio-economic circumstances (in a very rough fashion), those with liberal abortion laws seem to have higher abortion rates. This happens if Eastern Europe is compared with South America, Middle Africa with South-Eastern Asia, or even

A domestic approach which does not explicitly prohibit violations of the right to life of the unborn—apart from the exceptions allowed by the "in general" expression—seems to be inadmissible in the Inter-American system. The first reason for affirming this is the right to equal protection established in Article 24 of the Convention, which supports the use of the same means for the protection of both born and unborn people. This is also supported by the fact that the Convention places in the same sentence both the protection of life before and after birth, suggesting that protection of born and unborn individuals should be given in analogous terms—apart from the exceptions allowed by the "in general" expression. Besides, a non-prohibiting approach to the violations of the right to life would be at odds with the Court's constant case law in this regard.[138] Finally, the Convention framers' opposition to suppressing the reference to conception, and the terms in which the discussion was carried on in the *travaux prépraratoires*, suggests that the framers had prohibitive rules in mind.[139] In view of the foregoing reasons, this brief of *amici curiae* considers that the obligation to protect the unborn *by law* requires domestic legislations to prohibit attempts against the life of the unborn, except for the cases covered by the "in general" proviso. The permissible exceptions to this prescription will be analyzed in the following section.

Western Europe with the U.S.A. and Canada (where the grounds on which abortion is permitted are not substantively dissimilar, but there are different time limits in which abortions may be performed). See *Id.* at 1342. Something similar is noted in a less recent publication. Stanley Henshaw, Susheela Singh & Taylor Haas, Guttmacher Institute, *The Incidence of Abortion Worldwide*, 25 INT'L FAM. PLAN. PERSP. S30, S31 (1999). A tentative explanation of the tendency for socio-economic development to affect the rates of terminations of pregnancies could be that the social problem of abortion cannot be tackled only via restrictive laws; rather, it requires other provisions, such as education and support for pregnant mothers. These provisions are more likely to be provided in regions with a higher socio-economic development.

[138] Among other things, the Court has been quite consistent in interpreting the Convention as imposing on the State a duty "to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishments on them, and to ensure . . . the victim adequate compensation." González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 236 (Nov. 16, 2009). Similarly, it has considered it most important to determine whether "the State has allowed the act to take place without taking measures to prevent it or to punish those responsible." *Id.* For a critique of the Court's requirement to punish human rights violations, see Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding State's Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT'L L. REV. 195 (2007). Even if this doctrine is narrowed down to cover only grave violations, it would be difficult to consider that violations of the right to life are not included within this group.

[139] Furthermore, this could be the reason why the Convention states that protection of the unborn had to be established "by law," since the principle of legality affirms that sanctions may only be imposed by legal norms. This principle is provided for in Article 9 of the Convention (the English version of the Convention calls this right "Freedom from Ex Post Facto Laws," so the content of the Article is not as clear as in the Spanish version, whose heading reads "Principio de Legalidad y de Retroactividad," which could be translated as *Principle of Legality and of Retroactivity*).

3.2. Correct Interpretation of Article 4(1)'s Expression "In General"

The text of the Convention is clear when stating that the general rule should be to defend the unborn, and that the non-protection of life by law and from the moment of conception is only allowed in exceptional circumstances.[140] The obligation to protect life before birth will often require the State, for instance, to defend the mother from a third party's actions which could damage her child (e.g. if the mother is required to carry out highly demanding physical jobs while pregnant). However, the text of Article 4(1) allows some exceptions to this principle of protecting life. These exceptions could seem to be philosophically incoherent with the spirit of the Convention, but it is not so if they are interpreted in light of other provisions of the American treaty.

Neither the Convention nor its *travaux préparatoires* left many clear clues for solving the question of which exceptions to the right to life might be allowed by the Convention. When interpreting Article 4(1) the reader should follow the principle of *ut res magis valeat quam pereat*, excluding interpretations which render useless the clause "in general, from the moment of conception."[141] Thus, Article 4(1) excludes interpretations which render meaningless the general rule of protection from the moment of conception, as is the case with the elucidation of Cecilia Medina, who seems to find in the United States' *on-demand* regulation of abortion an example of what the Convention wanted to endorse.[142] This interpretation forgets that, according to the Convention, the protection of unborn children's life should be the general rule, and therefore, the Pact of San José forbids the implementation of abortion *on-demand*. Likewise, this interpretation disregards that the very Article 4(1) of the Convention establishes that "[n]o one shall be arbitrarily deprived of his life."

As a consequence, the most suitable interpretation is the one that follows the clearly stated provision of Article 4(1), and utilizes diverse interpretive methods for deciphering the unclear expression "in general."[143] When interpreting this it is paramount to consider the fact

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[140] Otherwise, the relevant norm would provide: "and, *exceptionally*, from the moment of conception."

[141] This principle is also called the principle of effectiveness, and it provides that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted." 2 INTERNATIONAL LAW COMMISSION, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1966, 219 (1967).

[142] MEDINA QUIROGA, *supra* note 21 at 76.

[143] It is worth noticing that Rita Joseph finds in the *travaux préparatoires* of the ICCPR the key for interpreting Article 4(1) of the Convention. She considers that the expression "in general" was not added as a compromise for allowing States to maintain their abortion laws: "but rather as a practical indication that the term

that the framers of the Convention did not accept the proposal of the United States and Brazil, whose legislation at the time allowed abortion in very limited cases.[144]

The most convincing interpretation of Article 4(1) considers that the framers of the Convention did not wish to allow the kind of abortions accepted by that time in legislations such as that of Brazil and the United States. Therefore, it asserts that the "in general" proviso only allows as exceptions to the right to life those accepted in legislation banning direct abortion. These legal systems consider as non-punishable abortions resulting from the application of the principle of double effect.[145] These are abortions which come about as the foreseen, but unwanted, effects of medically indispensable and proportional interventions on the mother's body.[146] They are not produced by directly harming the unborn. An example of these indirect abortions would be the case of a pregnant woman who requires immediate radiation therapy as the only way of treating a life-threatening cancer, a procedure which would probably result in the death of the unborn, as it was apparently the case of "Amelia," analyzed by the Inter-American Commission.[147] Something similar could happen in the case of an ectopic pregnancy.[148]

Notwithstanding what was established in the foregoing paragraph, a system where abortion is forbidden is compatible with criminal rules which may lessen or even extinguish criminal responsibility for those who take part in forbidden actions, as might occur in the application of extenuating circumstances. A much more contested exception to the legal protection of the unborn's right to life in countries where abortion is forbidden, is the case of criminal legislation enshrining a broad concept of the state of necessity. A provision like this

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'from the moment of conception' was to be read figuratively rather than literally. That is, the phrase 'in general, from the moment of conception' is to be understood as roughly from earliest moments of existence, or more practically speaking, from first knowledge of the child's existence by the mother, her doctor and/or the State." JOSEPH, *supra* note 18 at 225.

[144] As it was already stated, Brazil allowed abortion only in a few cases, and *Roe v. Wade* had still not been decided in the U.S. For an extensive list of the latter country's limited state laws regarding abortion before *Roe v. Wade*, see Roe v. Wade, 410 U.S. 113, footnote 2, at 118 & 119, and footnote 37, at 140 of this judgment (1973).

[145] The case in respect of Chile is described in Alejandro Miranda Montecinos, *El Principio del Doble Efecto y Su Relevancia en el Razonamiento Jurídico*, 35 R. CH. D. 485, 510-3 (2008) (Chile).

[146] This assertion does not intend to be a precise and exhaustive application of the principle of double effect to the issue of abortion, since this principle contains some conditions in which this brief will not dwell. These conditions are referred to in Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 No. 4 ETHICS 527, 528-9 (1980). For an in-depth debate about this principle see THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE (P. A. Woodward ed. 2001). Another interesting work is Edward C. Lyons, *In Incognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L.R. 469, 482-4 (2005).

[147] "Amelia," Nicaragua, PM No. 43-10, 2010, Inter-Am. Comm'n H.R., *supra* note 118.

[148] Two different interpretations of what the principle of double effect would allow in the case of ectopic pregnancies may be found in Philip E. Devine, *The Principle of Double Effect*, 19 AM. J. JURIS. 44 (1974) and in Christopher Kaczor, *Moral Absolutism and Ectopic Pregnancy*, 26 J. MED. & PHIL. 61 (2001).

may be applied by the judiciary to absolve those who procure an abortion in the context of a life-threatening pregnancy.[149] This latter system does not explicitly allow abortion, but may leave unpunished its performance.

This brief's interpretation is the most convincing in light of the provisions of the American Treaty analyzed as a whole. The first reason for its persuasiveness is that it takes into account the fact that the proposal of Brazil and the United States was rejected, a reality to which the Commission's interpretation is blind. Indeed, this rejection can only mean that the American countries did not want to allow the very exceptions to the right to life accepted by the previously referred States, which were very limited.

The Commission's interpretation seems to consider the current wording of Article 4(1) to be a political compromise between countries which allowed abortion in certain cases and those which did not.[150] This is not appropriate, since it pays no attention to the fact that the position of Brazil and the United States was not accepted. Furthermore, the Commission has even considered, inadequately, that States are *obliged* to establish some exceptions to the right to life. This dismisses that the phrase "in general" would have been established—at the most—as an escape valve, not as a commandment. No interpretation of Article 4(1) allows considering abortion a right in the Inter-American system.

The presence of provisions like those of Brazil and the United States in some other countries of the Americas does not espouse an interpretation that the American States wanted to allow these particular cases of abortion.[151] Indeed, human rights treaties usually reflect the intention of States to modify their laws in accordance with what is stated in these instruments. This is the reason why Article two of the Convention obliges States to adapt their legislation to the Pact of San José. For instance, several State delegates voted in favor of a provision establishing equal rights for children born in and out of wedlock, while explicitly stating that the legislation of their countries was at odds with this provision.[152] Besides, it must be remembered

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[149] According to the U.N., this is the case of the Dominican Republic. 1 UNITED NATIONS, ABORTION POLICIES: A GLOBAL REVIEW, 130 (2001), *available at* http://www.un.org/esa/population/publications/abortion/index .htm (last visited Jan. 31, 2011).

[150] It must be remembered that the Commission has applied the Convention only in cases such as those of Paulina Ramírez, In Vitro Fertilization, and in general documents such as country reports, since in the *"Baby Boy" case* the Commission applied the American Declaration, not the Pact of San José.

[151] Unfortunately, we do not know if States with abortion laws voted in favor of or against the Convention's reference to the moment of conception. The lack of details in the *travaux préparatoires* can be seen in: SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 48 at 160.

[152] *Id.*, at 227-9.

that the framers of the Convention decided to maintain this reference to conception "for reasons of principle."[153]

Another reason why this brief's interpretation is the most plausible is the distinction between *protection* and *respect* enshrined in the first and second sentences of Article 4(1). The Convention states that there will be cases in which the right to life might not be *protected*, but the *respect* of the right to life has no exception according to the Pact of San José. This wording is enigmatic, because both concepts usually go together. It is not easy to understand how a right can be respected but not protected. However, this enigma is solved by the interpretation of the "in general" phrase endorsed by this brief. Indeed, this brief's reading does not disrespect the unborn child's right to life, since it does not allow actions performed directly against the *nasciturus*. At the same time, this interpretation allows cases in which the protection of the unborn's right to life is not enforced, since the *nasciturus* may perish if his or her mother is in need of undergoing some necessary life-saving medical treatments.

A further argument why the this brief's interpretation is the most convincing is that it accords with the right to equal protection established in Article 24, which provides: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." This provision is applicable to the unborn, who is considered a person before the Convention, as was submitted earlier in this brief. Therefore, a consistent interpretation of the American treaty would consider that the right to life of the unborn should stand on equal terms with that of his or her mother, and therefore, would admit as exceptions only those in which there is no direct attack upon the *nasciturus*. An interpretation allowing actions directly intended to end the life of the unborn, even if performed after balancing some interests of the mother against those of the unborn, would go against Article 24 of the Convention.[154] Consequently, only an interpretation which does not go directly against the right to life would be an admissible exception to the protection of the right to life under Article 4(1) of the Pact of San José.

The interpretation endorsed by this brief is not only more coherent with the text and history of the Convention, but also requires less subsequent interpretation by the Inter-American Tribunal than the Commission's reading. The main issue that the Commission's

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[153] GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, *supra* note 13 at 97.

[154] This is especially so if the unborn is aborted for being disabled, since that action would go against the understanding that every human being—no matter their physical or mental condition—are of equal human dignity. *Cf.* Alison Davis, correspondence, *Right to Life of Handicapped*, 9 J. MED. ETHICS 181, 181 (1983).

interpretation leaves open to further elucidation by the Court is which kind of abortions would be exceptionally allowed and how they would be determined. It might be possible to argue that these abortions are those referred to by the Brazilian delegate, but even these limited grounds for terminations of pregnancy would give rise to the inconsistencies already referred to (*e.g.*, disrespect for life, inequality, etc.). Similarly, the establishment of exceptions to the protection of the right to life without a mechanism to gradually abolish them, as in the case of capital punishment, would seem to be philosophically incoherent in the context of the Convention when considered as a whole.[155]

Another issue which should be elucidated if the Commission's interpretation is adopted is whether the phrase "in general" was aimed at granting a political escape only for the countries which already had abortion laws when this provision was enacted, or also for those which did not permit abortion at that time. In this particular regard, since the Convention and the *travaux prépratoires* give no clues for elucidation, the reader could apply two interpretative rules which lead to opposite results. It could be understood, applying the principle that when the law makes no distinction the interpreter should not do so,[156] that this exception could also be applied by States whose laws forbade abortion during the drafting of the Convention. On the other hand, the reader could apply the interpretive principle that exceptions to a general rule must be read restrictively, especially when they exclude an application of a general rule of a human rights nature, in which case the result would be the opposite.[157]

4. Article 4(1) and In Vitro Fertilization

It was shown that the expression "in general" is aimed at addressing cases arising from the application of the principle of double effect, a principle which can be applied only when an action has two effects—one intended and one unintended. Since the medical body performing in vitro fertilizations has solely one effect (the creation of embryos for their subsequent implantation), the principle of double effect will play no role when determining whether this reproductive technique is accepted by the Convention. Hence, the meaning of the phrase "in

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[155] Art. 4(2) *in fine* provides: "The application of such punishment shall not be extended to crimes to which it does not presently apply." Art. 4(3) states: "The death penalty shall not be reestablished in states that have abolished it."

[156] I.e., *Ubi lex non distinguit, nec nos distinguere debemus.*

[157] See the German decisions previously quoted in note 133.

general" is of no use for determining whether in vitro fertilizations are allowed of forbidden by the American Convention. What should be determined is whether the action of fertilizing several eggs in vitro for their subsequent implantation in a woman's womb constitutes an attempt against the life of the unborn.

Scholars have no consensus on whether in vitro fertilizations violate the right to life of the unborn. Most States consider this technique to be legal but—as the European Court of Human Rights asserted in a case related to the unborn—"consensus cannot be a decisive factor in the Court's examination."[158] Indeed, for deciding this case it is much more relevant for the Inter-American Court to take into consideration the importance of the non-derogable right which Costa Rica claims to be protecting;[159] the cogency of the arguments presented by this State; and the democratic consensus existing domestically towards this measure.

In the final report that gave rise to this case, the Inter-American Commission asserted explicitly that the restriction of in vitro fertilization fulfilled the requirements of legality, legitimate aim and adequacy. Its only concern regarded the alleged over restrictiveness of banning this technique and its relation to the right of non discrimination. The question now is whether the subsidiary nature of the Inter-American system should allow Costa Rica to determine which policies are proportionate in the defence of the right to life. Indeed, when deciding on the debatable matter of in vitro fertilization the Court should take into consideration its own subsidiary nature, which is not only established implicitly in the preamble of the Pact of San José, but has also been utilized by the Court as a guiding principle of its actions.[160]

The principle of subsidiarity has both a positive and a negative aspect, in other words, implies the duty of acting and the duty of abstaining from action. The positive aspect means that the Court should exercise its jurisdiction when domestic bodies are unable to do so. The negative aspect affirms that the Court should abstain from acting when domestic bodies are able

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[158] The European Court asserted this when upholding Ireland's broad protection of the unborn's life. A, B & C v. Ireland (App. No. 25579/05) Eur. Ct. H.R. (Dec. 16, 2010) ¶ 237.

[159] The Court has asserted that the right to life plays a fundamental role in the American Convention, because it is part of the non-derogable core of rights, and because "it is the essential assumption for the exercise of the other rights." González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, (Nov. 16, 2009) ¶¶ 244-45. Regarding the principle of subsidiarity before international tribunals *see*: Paolo G. Carozza, Subsidiarity as a Structural Principle of International Human Rights Law, 97 AM. J. INT'L L. 38 (2003).

[160] In Ríos et at. v. Venezuela the Court states that "[t]he international jurisdiction has a subsidiary, contributing, and complementary nature." Ríos et al. v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 194 (Jan. 28, 2009) ¶ 53. Similarly, the Court implicitly uses this principle in Berenson-Mejía v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004) ¶¶ 154-155.

to do so. The latter aspect is related to the European Court of Human Rights' doctrine of the "margin of appreciation," according to which "state authorities are in principle in a better position to give an opinion on the necessity of a restriction."[161] In this case about in vitro fertilization, domestic bodies have exercised by themselves the power of determining which kind of threats to human life are acceptable and how should they be restricted.

Costa Rica has shown that its ban of in vitro fertilizations seeks to protect life, which according to many is the American Convention's most fundamental right. The protection of life justifies the restriction of other rights. In this case, for instance, it may require couples with fertility difficulties to seek the aid of other fertility treatments, or to consider adoption as a means to exercise their right to *to raise a family*.[162] When confronting this restriction with the importance of the right to life, the State considered that it was proportional. When considering the proportionality of this action, the State also took into consideration that this prohibition was established eminently on a temporary basis. Indeed, the swift advancements of research on vitro fertilizations may reach a state in which the mortality rate is reduced to proportions acceptable according to Costa Rica's Supreme Court. Finally, it must be remembered that the Costa Rican people recently rejected the introduction of in vitro fertilization in a democratic legislative process, revealing that the decision of the Supreme Court reflects national values.

Thus, the paramount importance of the right which Costa Rica is claiming to protect, and the democratic agreement existing domestically in this regard—both in the legislative and in the judicial branches—make this case very suitable for the application of the margin of appreciation. In other words, it would be advisable for the Inter-American Court to declare that Costa Rica has freedom for deciding the most suitable way for defending the life of the unborn.

Conclusion

The American Convention is clear in stating that the unborn has a right to life, even though it may not always be protected by law. Furthermore, the Pact of San José recognizes the personhood of the unborn. This conclusion is partly shared by the Commission, despite this

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[161] PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 161-62 (2011).

[162] This right is established in Article 17(2), and is subject to these men and women meeting "the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention."

body's negative stance towards the prohibition of actions affecting the unborn which are widely accepted in the Americas (as happens with in vitro fertilizations).

In some juridical systems the controversy between the interests of unborn children and those of pregnant women has been understood as a clash between the rights or interests of these two groups. However, in the American system of human rights this alleged clash is solved by the Pact of San José itself. According to this treaty the right to life would trump other conflicting rights or interests. Indeed, "the right to life plays a key role in the American Convention as it is the essential corollary for realization of the other rights."[163] Notwithstanding the foregoing, the Convention's wording allows exceptions to the legal protection of the right to life of the unborn, although it does not explicitly describe them. Thus, this brief engaged in deciphering the meaning of the Convention's right to life in respect of the unborn.

The text of Article 4(1), the analysis of the Pact of San José as a whole, and the history of the Convention allow us to decipher the most convincing reading to the Convention's exception to the unborn's right to life. According to this interpretation, the Convention only allows as exceptions to the unborn's right to life, those actions which, following the principle of double effect, go indirectly against unborn's life. The main reasons for this assertion stem from the text of Article 4(1), the analysis of the Pact of San José as a whole, and the history of the Convention. However, the principle of double effect plays no role in the procedure of in vitro fertilizations. Thus, the issue *sub judice* is whether in vitro fertilizations violate the unborn's right to life, and who is called to make such a decision in a matter as debated as this one. In this matter there are opposing reasonable interpretations—in spite of the fact that this technique is legal in most States.

One of these reasonable interpretations is that of the Supreme Court of Costa Rica, which considered that in vitro fertilization constitutes an attempt against the life of the unborn. This decision was delivered by a former president of the Inter-American tribunal. On the other hand, the Inter-American Commission's final report considered that the Costa Rican ban on in vitro fertilization was legal, legitimate and adequate, but that it was over restrictive and—with some dissenting opinions—discriminatory. The Inter-American Court is faced with these two

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[163] "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 156 (Sept. 2, 2004). *Cf. Xákmok case*, ¶ 186. The Court continues by saying that "[w]hen the right to life is not respected, the other rights vanish because the bearer of those rights ceases to exist. States have the obligation to ensure the conditions required for full enjoyment and exercise of that right."

interpretations. When deciding upon the matter, the Court should take into consideration that the Inter-American system of human rights has a subsidiary nature, and that the State should be granted a margin of appreciation for determining which restrictions are proportionate in complex matters. Hence, the Court should rule that Costa Rica did not violate the Convention when banning the technique of in vitro fertilization. A decision such as this one is also supported by the importance of the human right that the State is alleging to protect, and the national values reflected by an impeccable democratic system, where this matter was recently discussed. Furthermore, Costa Rica is entitled to apply the precautionary principle, which weighs in favor of protecting life in cases of doubt. Costa Rica should be granted a margin of appreciation for determining the best way of protecting the life of a developing human being.

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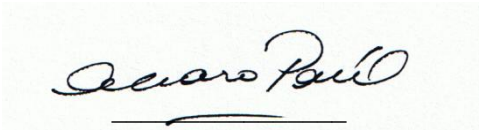

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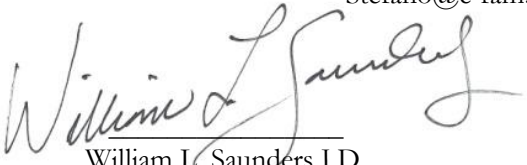

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